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89-1790

Supreme Court, U.S.
FILED
MAR 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

AMY McCAIN, A MINOR,
B/N/F WILLIAM R. McCAIN,
WILLIAM R. McCAIN AND
AMY McCAIN,

Petitioners,

vs.

HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMY McCAIN
WILLIAM R. McCAIN
No. 920
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Houston, texas 77040
(713) 462-3204
Pro Se

QUESTIONS PRESENTED FOR REVIEW

I. THE APPELLATE COURT HAS MIS-QUOTED WOOD V. STRICKLAND, THEREBY CHANGING WELL ESTABLISHED FUNDAMENTAL CONSTITUTIONAL LAW.

II. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS, ON APPEAL FROM THE SUMMARY JUDGMENT ". .REFUSED TO VIEW THE CASE FROM A STANDPOINT MOST FAVORABLE TO THE APPELLANT(S) AND ACCEPT. .(THEIR).. ALLEGATIONS OF FACT AS TRUE AND ASSUME A STATE OF FACTS MOST FAVORABLE TO THEM. ."

III. A GOVERNMENTAL AGENCY CANNOT LEGITIMIZE THAT WHICH IS AN ILLIGITIMATE CONSTITUTIONAL DEPRIVATION BY GIVING NOTICE THAT IT INTENDS TO ACT UNLAWFULLY.

IV. THE APPELLATE COURT'S ARGUMENT THAT PROCEDURAL DUE PROCESS WAS GIVEN IS IRRELEVANT WITH RESPECT TO THE "INVASION OF PRIVACY" ISSUE IN THIS CASE.

V. CAN THE DISTRICT AND APPELATE JUDGES REFUSE TO ENFORCE 42 U.S.C 1983 WHERE THEY ADMIT TO VIOLATIONS OF STATE LAWAND THEIR OWN RULES AND REGULATIONS BY REFUSING TO ALLOW STUDENTS AND THEIR PARENTS TO PETITION THE BOARD FOR REDRESS OF GRIEVANCES, WHICH REFUSAL HAS PERSISTED FOR "A NUMBER OF YEARS".

VI. MINOR AMERICAN STUDENTS ARE A PROTECTED CLASS UNDER 42 U.S.C 1985 (2)(3).

VII. HIST ACTED ARBITRARILY WHERE THEY NEITHER ALLEGED NOR FOUND THAT AMY McCAIN VIOLATED THE MANDATORY STANDARDS SET BY THE HISD BOARD AS EXCLUSIVE GROUNDS FOR SUSPENSIONS OR EXPULSIONS.

ADDITIONAL DEFENDANTS

HOUSTON INDEPENDENT SCHOOL DISTRICT
(Face Sheet)

BART BUSKER,
RAY REINER,
JOAN RAYMOND,
LES SUMRALL,
BRADRAFFLE
CATHY MINCBERG
AUGUSTINA REYES,
MELODY ELLIS
OLGA GALEGOS,
KAYE STRIPLING,
DON BOEHM,
KELLY FRELS,
JOE HARRELL,
ERNEST BREW
JOE MUSKETT,
ERNEST LANG, Respondents

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

AMY McCAIN, A MINOR B/N/F WILLIAM R. McCAIN, WILLIAM R. McCAIN, and WILLIAM R. McCAIN and AMY McCAIN,

Petitioners,

vs.

HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Amy McCain, in her own right, and by next friend William R. McCain, and William R. McCain respectfully pray that a writ of Certiorari issue to review the judgment and unpublished opinion of the United States Circuit Court for the Fifth Circuit, entered in this proceeding on October 18, 1989.

OPINIONS BELOW

Opinions of the District and Appelate Courts are contained in the Appendix. Neither opinion was reported.

JURISDICTION

The judgment of the Court Of Appeals (Ap. p. 1)was entered on October 18, 1989. Mr. Justice White extended its time for docketing and filing Petitioners' Petition For Certiorari to and including March 28, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction in The United States District Court was invoked under 42 U.S.C. 1983, 1985(2)(3), 1986 and 1988, and in the Circuit Court of Appeals under 28 U.S.C. Sec. 1291.

CONSTITUTIONAL AND STATUTORY AUTHORITIES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. Constitution Of The United States, First Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and siezures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be siezed. Constitution of the United States, First Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Constitution Of The United States, Fifth Amendment

We the people of the United States, in order to . . secure the blessings of liberty to ourselves and our posterity do ordain and extablish this Constitution for the United States of America.
Preamble, Constitution of the United States

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
42 U.S.C. 1983

. . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws. .the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspiritors.
42 U.S.C 1985(2)

If two or more persons in any State or Territory conspire . .for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or

Territory the equal protection of the laws . .in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators. 42 U.S.C. 1985(3)

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongfull act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence, could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action;. .
42 U.S.C.1986

State Of Texas

(a) In accordance with rules adopted by the State Board of Education, the board of trustees of a school district or the board's designee may, as provided by this section, suspend a student for a period not to exceed six school days or remove a student to an alternative education program. Suspension for a total of more than

six school days within a semester is considered an expulsion and may occur only as provided by Section 21.3011 of this code.

(b) Before it may suspend a student or remove a student to an alternative education program, the board or the board's designee must determine:

(1) that the student's presence in the regular classroom program or at the home campus presents a danger of physical harm to the student or to other individuals; or

(2) that the student has engaged in serious or persistent misbehavior that violates the district's previously communicated standards of student conduct.

(c) Before suspending a student, the board or its designee shall consider reasonable alternatives, including appropriate discipline management techniques which may include removal to an alternative education program. If the board or its designee determines that suspension is the most appropriate available alternative, the board or the board's designee is not required to precede the suspension with another disciplinary action. Texas Education Code, Sec. 21:301

The school attendance officer shal proceed in juvenile court against any child within the compulsory school attendance age who is reported to him as being insubordinate, disorderly, vicious, or immoral in conduct, or who persistently violates the reasonable rules and regulations of the school which he attends, or who otherwise persistently misbehaves in such a manner as to render himself incorrigible. Texas Education Code,S.21:302

(f) A student's parent or guardian is entitled to notice as soon as reasonably possible of a suspension or removal of a student to an alternative education program and an opportunity to participate in a proceeding before the board under this section. If the board's designee suspends or removes a student to an alternative education program for three or more consecutive school days or five or more accumulative school days within a semester, the designee shallencourage the student's parent or guardian to attend a conference to discuss the designee's action and/or the student's misbehavior. Any decision of the board under this section is final and may not be appealed.
Texas Education Code, Sec. 21:3011

(e)(3) The educator shall not intentionally e pose the student to disparagement.

(4) The educator shall not reveal confidential information concerning students unless disclosure serves professional purposes or is required by law.
Texas Administrative Code, Sec. 177.1

HOUSTON INDEPENDENT SCHOOL BOARD POLICIES AND PROCEDURES ARE LISTED IN THE APPENDIX INDEX

THE FOURTEENTH AMENDMENT IS QUOTED IN THE CONCLUSION PAGE 37 ET. SEQ.

STATEMENT OF THE CASE

Plaintiffs brought this action against the Houston Independant School District, their agents, employees, designees, officers, School Board members, and representatives of said parties, invoking jurisdiction under ss. 28 USC 1343, 42 USC 1983, 1985 (2) (3), 1988, alleging violations of the above federal statutes, as well as violation of the First, Fourth, Fifth, Fourteenth Amendments to the Constitution of The United States, and their Texas equivalents, as well as the violation of Plaintiff's constitutional Right To Privacy. (R143-158) On June 9, 1988 the Defendants filed their Motion To Dismiss along with their memorandum claiming that the Plaintiff's failed to state a cause of action or to perfect service on Defendants. (R 124 et seq.) Return of Summons was filed on June 28, 1988 by the Court. (R 141) Plaintiffs' Memorandum

In Opposition To Motion To Dismiss was filed on June 28, 1988 and Defendants filed a Supplement to their motion of July 1, 1988 along with an affidavit of Principal Ray Reiner. (R 100,92 respectively) Defendants' Response to Plaintiffs' Opposition Memorandum was filed by the Defendants on July 5, 1988. (R85) Amy McCain's Affidavit along with 55 pages, representing the record made in the proceedings before the school district, were filed on July 8, 1988. (R 14-79) The Defendants filed their final memorandum on August 8, 1988. (R 8) On August 31, 1988 the District Court converted the Defendants Motion to Dismiss to the parties and without setting a submission date. (R 4) The Court dismissed the Plaintiffs' complaint on August 31, 1988 and said order was docketed on September 6, 1988. Notice of Appeal was timely filed on September 30, 1988 and docketed with the Appellate Court on October 10, 1988.

Docketed with the Appelate Court on October 10, 1988.

A copy of the District Court's findings and judgment is in the Appendix p.A15.

The Fifth Circuit Court of Appeals rendered judgment denying Amy and William R. McCain's appeal on October 18, 1989. The Appellate Court refused to publish their opinion in violation of local Appellate Rule 47.5.1, the Court having made radical and ultra vires changes in fundamental Constitutional rights of students by misquoting Wood v. Strickland (supra). A copy of the Appellate Court's decision and denial of the Petition for Rehearing is located at p.A1 of the Appendix. The Appellate Court refused to file the Suggestion For For Rehearing In Bank and Motion For Leave To Extend The Length Of Brief by five (5) pages. The Court further refused Petitioner Amy McCain access of the Federal Judicial system by refus-

ing to act on or to even showed filed, Amy McCain's Petition To Substitute Parties, and their refusal to substit- her as a party on reaching the age of majority.

STATEMENT OF THE FACTS *

On May 26, 1987 a Lamar High School student, at the request of a teacher, brought a keg of beer to school in order to demonstrate a beer tapper which he had been asked to design as part of a class project. As a result an empty cup, with the smell of beer, was left in the area where Amy McCain and another girl were waiting for their ride home. A Lamar High School coach ordered Amy to pick-up the cup and bring it to him.

Amy and other students were sent to the vice-principal's office where, with the door wide open, and in the presence of uninvolved students and other people, they were publicly ridiculed and accused of possession and consumption of beer by vice-principals Busker and Brew.

---

*We have listed a more comprehensive statement of the facts in the Appendix, p.A20 which is the precise language which Petitioners used in the Fact portion of their appeal before the Appellate Court.

Amy told them that she did not have possession of the cup and only picked it up at the direction of the coach, and, that the cup was empty except for the smell of beer. The vice-principals kept changing the allegations and would not, otherwise let Amy or the other students tell their side of the story. Amy was publicly threatened with arrest, suspension and expulsion, and with denial of her right to make-up final exams which were to begin the next day, a violation of The Texas Education Code (TEC Sec 21:301(h)

The next morning Amy's adult sister went with her to Mr. Busker's office, expecting to hear an explanation of why the school was directly responsible for a student bringing a keg of beer to school for a class demonstration to start with. (an act in violation of Texas Criminal Law, Texas Education Code Sec. 4:22) Instead, without notice of hearing, Amy was

suspended for two days but denied the right to return to school until a hearing, to be held before vice-principal Busker, on a date to be set later at his discretion and at which he retained the right to add further punishments.

Later that same morning, on learning of the suspension, Amy's father, William R. McCain went to Mr. Busker's office. Although vice-principal Busker had already talked to coach Muskett and security guard Land, Mr. Busker admitted that he knew that the cup was only picked up at the direction of the coach and that the cup was empty except for the smell of beer. He said he suspended Amy, not because of misconduct, but because he needed more information. In short--the suspension was a tool of extortion in order to elicit confessions and favorable testimony in order to cover up Lamar High School's involvment in the

beer party. Mr. Busker threatened to retaliate against Amy if she and her father continued to complain about the suspension. No evidence was ever submitted that Amy was a member of the class where the keg of beer was taken or that she even knew the student involved, nor could there have been. The burden of proof was shifted to Amy to prove her innocence in order to re-enter school and avoid expulsion, additionable suspension and further sanctions. Furthermore HISD Board Policies and Procedures violated Due Process by require her to present evidence ". . .upon which the hearing officer can establish that the student did not do the alleged act" (Sec. 756.000, our emphasis)

Mr. McCain was not served with written notice of the charges at the meeting of May 27, as was found by the Appelate Court. He was served with written notice in the evening which cited Board Policy as:

"Suspension/Expulsion. Decisions to suspend or expel a student shall not be made until":

A. "There has been a hearing as provided by Section 751.200, Board Policies, involving the principal, the teacher, the student and his or her parent, guardian or representative.";

B. "At the hearing, the principal must find that the student";

1. "has assaulted a teacher or other persons on school property; or";

2. "has been previously declared incorrigible and has continued to be guilty of incorri(g)ible conduct during or after disciplinary reassignment (long term) to the extent that keeping the student in the program would serisouly impair the ability to the school to educate other children and";

3. "that no further reasonable efforts to educate the child can be made. . ."

C. "A copy of the written order suspending or expelling a student must be sent to the Chief Juvenile Probation Officer of Harris County." (our emphasis) (R 150, Par. 22)

School Board Policies provided:

"The Board or its designate may not suspend or expel a student except as provided in Policy Section...756.000" Art. 4, HISD Board Policy Sec. 752)

Section 756.000(b) provided:

> "The student is entitled to an impartial hearer of the facts. .If in doubt about whether the administrations acts, judgments or decisions are at issue or if the administration cannot conduct a fair and impartial hearing, the administrator should not conduct the hearing. The entire thrust of having a hearing is to have someone conduct it who is impartial and can render a fair decision."

Amy's father filed a sworn Motion For Recusement, a recorded hearing, sworn testimony, immediate reinstatement and expungment of the record. Mr. Busker ignored the Petition, waived two pieces of paper in the air, did not allow Petitioners to examine them, stated that they were the school's case, refused to allow Petitioners to submit evidence or make argument, and affirmed the two day suspension, which by then had consumed three days, during test week, placed her on indefinite probation, but did not notify her of that fact.

Petitioners appealed Mr. Busker's de-

decision to Principal Reiner who on June 4 affirmed the suspension, and refused to expunge the record, after conducting an:

". .inquisition type, exparte hearing:

(a) Evidence was accumulated and deliberations made in secret:

(b) Identities of witnesses were sesecret;

(c) Their testimony was kept secret;

(d) Accusations, arguments and decisions were made in secret by a tribunal that was partially identified and partially unidentified; and, under an evidentiary test based on the "feelings" of said tribunal, Amy McCain was told on June 4, 1987 that she had been ". .involvedl land. .to what degree. .is totally inconsequential.

(See Complaint par. 21 and 26, Apx. p.A5 and Appellate Court's finding Plaintiffs' complaint was limited to ". .closed-sessions of the administrative proceedings, page 6 of the Opinion, Apx. p. 29)

On failure of Principal Reiner to expunge the record and reverse the suspension, Petitioners , on June 10 1987, filed a Petition For Grievance under HISD Pol. and Proc. Sec. 740.000 for the equitable relief of expungment and investigation of

authorities responsible for bringing the beer onto the campus. This is a totally separate proceeding from the Disciplinary Appeal. This Section provides for a resolution of the Grievance Petition within 10 days, with automatic appeal to the next higher administrator, and ultimate resolution within 30 days. This Petition For Grievance, which eventially reached the School Board has never been addressed or acknowledged by anyone in the entire Houston Independent School District. In fact no one, including the Federal Judiciary has ever addressed or ruled on our prayer for the equitable relief of Expungment which was part of our complaint below.

On June 24, 1987 appeal was made to the School Board along with a contemporaneous and identical appeal to the District Superintendent Stripling. Though not authorized under Board Policy it was made

at the insistance of school officials and in order to avoid improper election of administrative remedies. Although Board Policies provided that Appeals at this level would be made on the record as established below,a false record was substituted in this hearing for the actual record made below and was ultimately substituted as the actual record, before the Board.

In the proceeding before the Board they refused to take judicial notice of the Appeal filed before it, of affidavits and other documents and the legal memoranda supporting Amy McCain's case. They falsly claimed that no recording was made of the hearing before principal Reiner. The Board further refused to even mark as evidence the 54 page certified record. The Houston Independent School District has for a number of years engaged in conspirital acts which has resulted in a to-

tal and complete denial of the student and parent's Right To Petition the Board which is guaranteed under the Texas Education Code, Sec. 21.3011(f). The factual details are described in the Petioners' Complaint.

NOTICE TO THE COURT

We fully understand the problems which the Court may have on granting Certiorari in a Pro Se application in this case which involves both serious legal issues and potentially broad applications. The Court is therefor being apprised of the de facto qualifications of one of the Petitioners to properly address the issues presented in this case.

Although Mr. McCain is not now licensed in any state he is a graduate of the Indiana University School of Law, and was a trial and appelate lawyer for fifteen years handling both state and federas lawsuits. He has had successful appeals reported in both Recent Federal Cases and Judicial Highlights in West's Advance sheets. He is a former member of the American Trial Lawyers Association, and the American and Indiana Bar Associations.

REASONS FOR GRANTING THE PETITION

(a) The Fifth Circuit Court has so far departed from the accepted and usual course of judicial proceedings and sanctioned such departure by the District Court so as to call for an exercise of the Supreme Court's power of supervision in that the Appellate Court misquoted and mis-stated the facts in this case, mis-stated the positions of the Petitioners, and it has attempted to drive Petitioners from the well of the Court by denying Amy McCain access to the Federal Judicial system by refusing her Petition To Substitute Parties on attaining the age of majority, by unwarranted threats of fines and imprisonment of Mr. McCain, and by sanctioning and itself engaging in misprisons which the 42nd Congress enjoined the Federal Courts to prevent in 42 U.S.C 1983, 1985(2)(3) and 1986.

(b) The Appellate Court mis-cited

Williams v. Boorstin as Binkman v. Johnson

(see p. 5 of its opinion) citing pages 112-113 of 663 F. 2d (1980) and it states:

> "Williams is part of that too broad fellowship of educated men and women everywhere who 'pad' their resumes, inflating their apparent strength. Unfortunately, Williams went beyond simple puffery and actually lied about his educational accomplishments. These statements were criminal." (note 7)

Note 7 says:

> "18 U.S.C Sec. 1001 (1975) The Penalty for 'false, ficticious or fraudulent' misrepresentations to an agency of the United States is a fine of up to $10, 000, or imprisonment for not more than five years, or both."

The Appellage Court has mis-quoted Wood v. Strickland (1975) 420 U.S. 308, 326: 43 L. Ed. 2d 214 on page 7 of its opinion, stating:

> "Public high school students do not have substantive and procedural rights while at school."

The Supreme Court actually said:

> "Public high school students do have substantive and procedural rights while at school."

The Court then banished its opinion to

dung heap of unreported cases, in violation of its own local rule 47.5.1, and beyond the critical gaze of the American bar and bench. The Fifth Circuit refused to change their opinion even after this misquote of the law was pointed out to them in Petitioners" Motion For Rehearing and Suggestion For Hearing In Banc.

(c) The Fifth Circuit Court of Appeals has further ruled on an important question of federal law which has not been, but should be settled by this Court and further its ruling regarding substantive and procedural due process rights is in conflict with a long line of Federal cases at all levels. The status of minor students as a protected class has been recognized in the concurring opinion of Mr. Justice Black in In Re Gault, 387 U.S. 1; 18 L.Ed. 2d; 87 S.Ct. 428,

I. THE APPELLATE COURT HAS MIS-QUOTED WOOD V. STRICKLAND, 420 U.S. 308, 326; 43 L. Ed. 2d 214, THEREBY CHANGING WELL-ESTABLISHED, CONSTITUTIONAL LAW.

The Court on page 7 of its opinion asserts;

> "Public high school students do not have substantive and procedural rights while at school."

The Supreme Court actually said:

> "Public high school students do have substantive and procedural rights while at school." (our emphasis)

The Appellate Court has, by its mis-quote and its clear refusal to act as a court, denied the Petitioners' Right To Petition for Redress, and by fiat declared the Bill Of Rights and the Fourteenth and Fifth Amendments to the Constitution of the United States a nullity.

A. Under our adversarial system of justice the litigants have the right to define the issues in their case. These Pro Se litigants did just that:

> ". .the defendants. .deprive(d)students

and parents of their Constitutional protections, including:

(a) Right to petition, 1st Amendment,

(b) Right to Privacy,

(c) Right to be secure from illegal searches and siezures, 4th Amendment,

(d) Right to due process, 5th and 14th Amendments,

(e) Right to Equal protection, 14th Amendment."

Neither the District nor the Court of Appeals lists Due Process as an issue in in this case. (see App. pp A1,15

On the Respondent's, and the Federal Judiciary's inability or unwillingness to counter the arguments of the Petitioners, the Appellate Court summarily stripped Amy McCain and William R. McCain of their citizenship.

This case, in fact, documents a total stripping of the Constitutional protections of an entire class of American Citizens, comprised of 40 Million students and

and their 80 Million parents.

B. The Appellate Court has endorsed a system of Pains and Penalties engaged in by the Houston Independent School District, wherein students are, by fiat, inflicted with ongoing punishments until such time as they confess to whatever naked charges school administrators choose to make. (See Article I, Sec. 9(3) prohibition of Bills of Attainer and ex post facto laws, Constitution of the United States) The Court has endorsed a system of justice that by misprison consistantly reversed the respective burdens of proof at both the federal and local school levels.

C. The combined federal and state authorities have denied Mr. McCain of his "..liberty under the Fifth or Fourteenth Amendments. .to. .establish a home and bring up children. .and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of hap-

piness by free men." Old Dominion Dairy v. Secretary of Defense, 631 F2d 953,962 (1980)

We have alleged and can prove that The Houston Independent School District has:

> ". .isolat(ed) students in the school environment from the protection provided by the laws of the State of Texas and from the state and United States Constitutions." (Cpt. par. 12, App.A41)

The right of a parent to protect his children is an ancient right dating to the time of King Solomon. In the Two Prostitutes Case the the king, the highest judicial authority of the land, entertained the Pro Se petition of the parent to proceed before him de novo in his capacity of parens patriæ. 1 Kings 3:16

The Code of Justinian provided:

> "..a father is considered to sustain damage when the character of his daughter is assailed." The Emperor to Clavis, Published on the day before the Ides of May, during the Consulate of Agricola and Clement 231, The Civil Law, Vol. 15-17, Enactments by Justinian.

D. Both local school authorities and the Federal Judiciary have denied Petitioners their fundamental right to Petition for Redress.

The right to Petition is the most fundamental of human rights by which people seek protection and access to their God and their government. With the first gasp of breath the cry of the infant seeks nourishment, nurturing, comfort and protection from its parent.

". . . the right to petition for redress of grievances is 'among the most precious of the liberties safeguarded by the Bill of Rights.' United Mine Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217, 222, 88 S. Ct. 353,356, 19 L. Ed. 2d 426 (1967) It shares the 'preferred place' accorded in our system of government to the First Amendment Freedoms, and has a 'sanctity and a sanction not permitting dubious intrusions'. . .Indeed as the Supreme Court recognized in United States v. Cruikshank, 92 U.S. 542, 552, 23 L. Ed. 588 (1875), the right to petition is logically implicit in and fundamental to the very idea of a republican form of government. Stern v. United States Gypsum, Inc. 547 F. 2d 1329, 1342(1977)

HISD admits that they have not allowed students and parents the right to petition the Board for a number of years.

On the denial of Petition our founding fathers said:

> "In every stage of these Oppressions we have Petitioned for Redress in the most humble terms. Our repeated Petitions have been answered only by repeated injury. A Prince , whose Character is thus marked by every act which may define a Tyrant, is unfit to be the Ruler of a free People." Declaration of Independence (1776)

II. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS, ON APPEAL FROM THE SUMMARY JUDGMENT ". .REFUSED TO VIEW THE CASE FROM A STANDPOINT MOST FAVORABLE TO THE APPELLANT(S) AND ACCEPT. .(THEIR). . ALLEGATIONS OF FACT AS TRUE AND ASSUME A STATE OF FACTS MOST FAVORABLE TO THEM." Barron and Holzoff, Summary Judgment Sec. 1242

Both Courts have invaded the province of the jury by weighing the evidence alleged in Petitioner's Complaint by arbitrarily deciding what part of the Petitioners' Complaint and supporting evidence they would choose to believe, even though Respondent, HISD, failed to file an an-

swer in denial in this case, nor did they file affidavits or other evidence to refute Petitioners' evidence.

III. A GOVERNMENTAL AGENCY CANNOT LEGITIMIZE THAT WHICH IS AN ILLEGITIMATE CONSTITUTIONAL DEPRIVATION BY GIVING NOTICE THAT IT INTENDS TO ACT UNLAWFULLY.

The facts are clear in this case. Although the vice-principal initially accused Amy McCain of possession and consumption of beer he said that the reason he suspended her was that "that he needed more information." The public humiliation of Amy McCain, the assault on Mr. McCain, the threats of arrest and the notice that the school may not allow make up of Amy's final examinations were extortion, purely and simply. They were efforts to coverup the fact that school authorities had contributed to the deliquency of minors. Their arbitrary actions were taken with the comforting knowledge that Petitions to the School Board had not been allowed for many years.

IV. THE APPELLATE COURT'S ARGUMENT THAT PROCEDURAL DUE PROCESS WAS GIVEN IS IRRELEVANT WITH RESPECT TO THE "INVASION OF PRIVACY" ISSUE IN THIS CASE.

The Appellate panel failed to address Petitioners' argument that the defamation associated with Invasion Of Privacy and the irreparable damage associated with that Constitutional invasion cannot be corrected by holding a trial or hearing after the fact, even if it did provide Procedural Due Process. The invasion was completed at the time it was committed. The denial of Substantive Due Process, once committed is irretrievable and cannot be corrected by a trial held later. This is so because reputation, like a rose, once crushed can never be restored to its original beauty. Pavesich v. New England Life Insurance Co. 50 S. 68 (1905), Screws v. United States 325 U.S. 115 et seq 18 L. Ed. 1510 (1944)

In fact it makes no difference whether Amy was guilty or not of the charges al-

legal. She was entitled to a private hearing in any event.

V. CAN THE DISTRICT AND APPELLATE COURTS REFUSE TO ENFORCE 42 U.S.C. 1983WHERE HISD ADMITS TO VIOLATIONS OF STATE LAW AND THEIR OWN RULES AND REGULATIONS BY REFUSING TO ALLOW STUDENTS AND THEIR PARENTS TO PETITION THE SCHOOL BOARD FOR REDRESS OF THEIR GRIEVANCES, WHICH HAS PERSISTED ". .FOR A NUMBER OF YEARS?

Respondents admit Par. 33(d) of Petitioners' complaint that they have denied students and parents, as a class, their right to Petition ". .for a number of years". The Texas Education Code provides:

> "A student's parent or guardian is entitled to notice as soon as possible of a suspension. . and an opportunity to participate in a proceding before the board under this section."

VI. MINOR AMERICAN STUDENTS ARE A PROTECTED CLASS UNDER 42 U.S.C. 1985(2)(3)

Invidious discrimination is a sanitized description of the brutalization of children which has existed since the early dawn of history. Children have been sacrificed, fondled, raped, killed, burned

and enslaved. Examples are not hard to find and indeed, are chronicled in the Bible. Children have been indentured servants in our own country and subjected to sweat shops. They have been considered by HISD, the United States District Court, and the Fifth Circuit Court of Appeals as "Guilty until proved innocent", since each has reversed the respective burdens of the parties in this case. The Court in In Re Gault, 387 U.S. 1; 18 L. Ed. 2d; 87 S. Ct. 428 at U.S. page 16 said:

> "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated is frequently a poor substitute for principle and procedure. In 1937 Dean Pound wrote:
>
> 'The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts. .'
>
> The Chairman of the Pennsylvania Council of Juvenile Court judges has recently observed;
>
> 'Unfortunately, loose procedures, high-handed methods and crowded court calenders, whether singly or

in combination, all to often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process.'"

On the same page, Note 7. Dr. Bovet, the Swiss psychiatrist in his monograph for the World Health Organization said:

"'One of the most definite conclusions of this investigation is that few fields exist in which more serious coersive measures are applied, on such flimsy objective evidence, than in that of juvenile delinquency.'"

Mr. Justice Black on page 61 in his concurring opinion went even further:

". .it would be a plain denial of equal protection of the laws- - -an invidious discrimination to hold that others subject to heavier punishments, because they are children, be denied these same constitutional safeguards"

VII. HISD ACTED ARBITRARILY WHERE THEY NEITHER ALLEGED NOR FOUND THAT AMY McCAIN VIOLATED THE MANDATORY STANDARDS SET BY THE HISD BOARD, IN THEIR QUASI-LEGISLATIVE CAPACITY, AS EXCLUSIVE GROUNDS FOR SUSPENSIONS OR EXPULSIONS.

The following is the exclusive ground for suspension or expulsion and was cited to the Appellate Court:

"Suspension/Expulsion. Decisions to suspend or expel a student shall not be made until"

A. "There has been a hearing as provided by Section 751.200, Board Policies, involving the principal, the teacher, the student, and his or her parent, guardian or representative.":

B. "At the hearing the principal must find that the student":

1. "Has assaulted a teacher or other persons on school property, or";

2. "has been previously declared incorrigible and has continued to be guilty of incorrigible conduct during or after disciplinary reassignment (long term) to the extent that keeping the student in the program would seriously impair the ability of the school to educate other children and";

3. "that no further reasonable efforts to educate the child can be made. . ." (our emphasis) Code Of Student Conduct
(R. 150, Par. 22, Com'p't)

CONCLUSION

Every successful civilization has had a system of laws, essestially democratic in nature, allowing its citizens direct access to and participation in the decision making process. Examples are the

Code of Hammurabi, the Justinian Code, the Judaic Code, the English Common Law and the American Constitution. The most significant contribution of the United States to western civilization is the breadth of the endowment of fundamental human rights. It is the freedom testimentally bestowed upon all men.

> "We hold these Truths to be self-evident, that all Men are created equal, that they are endowded by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." Declaration of Independence, (1776)

> "We, the people of the United States, in order to . .secure the blessings of liberty to ourselves and our posterity do ordain and establish this Constitution for the United States of America. Preamble to the Constitution of the United States

The breadth of the dream was achieved by a bloody civil war.

> "Fourscore and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal." Lincoln's Address at Gettysburg, 1963

The Fourteenth Amendment to the Consti-

tution of the United States says:

> "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C 1983 was passed in the throes of the Civil War. The title to 42 U.S.C. 1985 was "A law to enforce the Fourteenth Amendment to the Constitution." The Fourteenth Amendment itself defines the breadth of that great class it was intended to protect as "all...citizens of the United States." In a time when the chains of slavery are being thrown off all around the world, the question is whether the Court in this case is willing to disinherit the remaining generations of Americans.

The Appellate Court in addition to stripping Petitioners of all of their Constitutional rights held that punishments may arbitrarily be meted out, regardless of guilt or innocence so long as procedural niceties are followed. This Court held in Gault at page 28, U.S.:

> "The condition of being a boy does not justify a kangaroo court."

The truth is that the federal judiciary below did not know the difference between substance or, they simply did not to choose to address the substantive due process issues raised by the petitioners.

Substance is not the handmaiden of Procedure. The precise purpose of procedure is to determine the truth. (See Goss v. Lopez, supra,) When the respondents deprived Amy McCain of a protected interest in liberty or property for an act which they knew she did not commit, they acted arbitrarily and in violation of Amy McCain's substantive due process--an issue the

Courts did not address.

The gravamen in this case is the direct invasion of privacy of Amy McCain and the defamation associated with it. It was the public accusation of a crime and the threat of arrest and the failure of the school to allow her to show up at school to take her final examinations for three days that lead students to believe that she was arrested and jailed and spawned the rumor that Amy was arrested for possession of dope. The net result is that an honors student with an inpeccable disciplinary record is now a high school dropout and was in fact deprived of her scholarships to college after taking her GED to graduate. We request that the Court read the detailed fact sheet in the Appendix page A20 which is a shocking expose as to how some big city schools are treating American Citizens.

Tinker v. Des Moines Community School

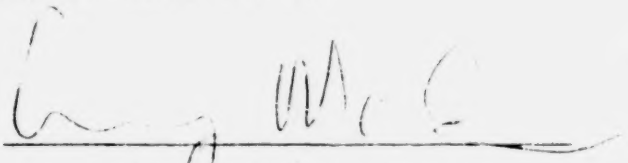
Dist., held at page 512:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." 393 U.S. 503, 21 L. Ed.2d 731, 741, 89 S. Ct. 733.

This case documents the total failure of the schools and the Federal judiciary to bridge from one generation to another fundamental democratic principles. They have further isolated them in reformatory like institutions which they call schools, from the protection of their parents and from the protections afforded all American Citizens.

Amy McCain worked hard for 16 years to establish a record of accademic and moral excellence. School authorities have here sacrificed the very life of a bright and vibrant young lady in order to save their own reputations from scandal. Mr. Busker and others had a direct interest in the outcome of Amy's hearing and denied her the means of vindication.

Petitioners pray that a Writ of Certiorari issue in this case.



Amy McCain, Pro Se

William R. McCain, Pro Se and Next Friend of Amy McCain

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2992
Summary Calendar

AMY MCCAIN, A Minor, b/n/f WILLIAM Mccain, and WILLIAM R. MCCAIN,

Plaintiffs-Appellants,

VERSUS

HOUSTON INDEPENDENT SCHOOL DISTRICT, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
(CA-H-88-1796)
(October 18, 1989)

Before HIGGINBOTHAM, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[1]

The plaintiffs brought this action pursuant to 42 U.S.C. Sec. 1983, 1985 (2), (3), 1986, and 1988 for asserted violations of the rights to petition, to be

free from unlawful search and seizure, of equal protection, and of privacy. The district court granted summary judgment in favor of the defendants, and we affirm.

I.

The plaintiffs allege that on May 26, 1987, plaintiff Amy McCain, a Texas high school student, was accused of possession of alcohol on the campus of Lamar High School of the Houston Independent School District (HISD). Amy McCain denied the allegation of Vice Principal Ernest Brew and Vice Principal Bart Busker in Busker's office. Busker talked to the confronting witnesses, Coach Joe Muskett and Ernest Lang over a walkie-

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[1] Local Rule 47.5.1 provides: "The publication of opinion that have no precendential value and merely decide particular cases on the basis of well-settled principals of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determinied that this opinion should not be published.

talkie. Amy McCain then presented her version, stating that "the cup was empty except for the smell of beer" and that "she was not holding the cup." Amy McCain was suspended by Busker.

A meeting was held later that morning which Amy McCain's father, William R. McCain, was given written notice by Busker of Amy McCain's two-day suspension for possession of a cup of beer and lying to an administrator. An administrative hearing was later conducted in which Busker affirmed the suspension. This decision was appealed to Principal Ray Reiner, and a further administrative hearing was conducted, whereupon the suspension again was upheld.

The mcCains appealed this decision, and another administrative hearing was conducted by District Superintendent Kay Stripling, whereupon the suspension was upheld. This decision was appealed to

the HISD Board of Trustees for further administrative review, whereupon the suspension was once again upheld. (Amy McCain does not contest that she was allowed to make up any examinations that she missed during the suspension.)

After receiving affidavits of the parties and other submissions, including part of the administrative record submitted by the plaintiffs, the district court construed the defendants' motions to dismiss as motions for summary judgment and granted the same. The court concluded that Amy McCain had been given the opportunity to be heard and to present her side of the beer controversy and that her due process rights had been protected by the various hearing levels. Therefore, the court concluded that for this short-term suspension she "was given more than the minimum due process guaranteed by the

Constitution for a suspension of less than ten days" (citing Goss v. Lopez, 419 U.S. 565 (1975)). The court found no arguable basis for the other purported claims.

II.

In Goss the Supreme Court specifically addressed the requirements of due process before the imposition of a short-term suspension. The Court determined that a ten-day suspension was a "serious event" and that, at the very minimum, students "must be given some kind of notice and afforded some kind of hearing." 419 U.S. 576-79 (emphases in original). The timing and content of the notice and the nature of the hearing may vary in each situation. However, the Court held that minimal due process required that

> the student be given oral or written notice of the charges against him and, if he denies

> them, an explanation of the evidence the authorities have and an opportunity to present his side of the story... There need be no delay between the time 'notice' is given and the time of the hearing. In the great majority of the cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.

Id. at 581-82. The minimum requirement of "an informal give-and-take between student and disciplinarian" is for the purpose of at least giving the student "the opportunity to characterize this conduct and put it in what he deems the proper context." Id. at 584.

The district court was correct that Amy McCain was afforded her due process rights in being able to explain and characterize her conduct after being initially confronted with the allegations of mis-

conduct. The court further properly concluded that her constitutional rights wer properly concluded that her constitutional rights were protected by the initial, informal hearing that occurred immediately after the offense and by the various hearings that followed. See Goss, id. at 581-82; Keough v. Tate County Bd. of Educ., 748 F.2d 1077, 1080 (5th Cir. 1984). Based upon the facts as alleged by plaintiffs and the affidavits and other exhibits, the court did not err in granting summary judgment on this claim.

The McCains also alleged violations of sections 1985(2), (3) and 1986, which involved a conspiracy designed to interfere with equal protection of the laws. The district court correctly dismissed these claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted, as claims brought pursuant to section 1985(2) and

(3) require as an element of the cause of action a racial or otherwisw class-based, invidiously discriminatory animus. See Bradt v. Smith, 634 F.2d 796, 800-02 (5th Cir. Unit A Jan. 1981), cert. denied, 545 U.S. 830 (1981). In the instant case the McCains have not pleaded facts alleging that Amy McCain is a member of a qualifying class. Nor has a claim under section 1986, which requires the esistence of a valid claim under section 198t. See Brandt, id. at 801-02. Tnd the attorney's fee provision of section 1988 is not applicable, as the McCains are not prevailing parties.

The district court also correctly concluded that, even based upon a liberal interpretation of the McCains' pro se complaint they have failed to assert facts supportive of a violation of the right to petition, the right to be free from illegal search and siezure, the right of

equal protection or the right to privacy. Their conclusionary statements are entirely insufficient. See Brinkmann v. Johnston, 663 F. 2d 111, 112-13 (5th Cir. 1986); Briscoe v. LaHue, 663 F. 2d 713, 723 (7th Cir. 1981), aff'd, 460 U.S. 325 (1983).

The McCains also contend that they were not given adequate time to respond to the defendants' motions, but the record does not support that assertion. The defendants filed their motion to dismiss on June 9, 1988. After the defendants filed a supplemental motion with an affidavit on July 1, the McCains on July 21 requested a three-week extension of time to answer. Eighteen days later, the plaintiffs responded with their own affidavit and with what they contended was the entire relevant factual record.

The McCains knew that their section 1983 claim was being challenged on the

basis of Goss, and they responded by coming forward with all of their evidence. See Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986). The McCains do not assert any additional facts which they wanted to present to the district court. Thus, the district court did not err in finding that they treated the motion to dismiss as one for summary judgment. Moreover, even if only the facts of the case and inferences therefrom are taken from the plaintiffs' complaint and viewed in the light most favorable to plaintiffs, and the additional materials from either party are not considered, the district court could have granted the motion to dismiss according to the standards of Fed. R. P. 12(b)(6) and Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

In reviewing the district court's grand of summary judgment, we apply the same standard of review as the district

court. Ayo v. Johns-Manville Sales Corp., 771 F. 2d 902 F- 2d 902, 194 (5th Cir. (1985). Summary judgment was properly granted as a matter of law based upon the facts as alleged in the complaint and the materials which the plaintiffs submitted, which demonstrated no genuine issue as to any material fact in the section 1983 claim. See Celotex, 477 U.S. at 322-24.

The McCains also complain of the closed-session deliberations of the administrative proceedings conducted to review the suspension, and they argue that they were denied the opportunity (to) cross-examine witnesses. However, they had the opportunity to present their side of the case at various times, Under the circumstances of the instant case, closed-session deliberations were not improper. See, e.g., Lamb v. Panhandle Community Unit School Dist., 826 F. 2d 526, 529 (7th Cir. 1987). For this short-term

All

suspension, based upon the various hearings conducted, due process did not include an opportunity to cross-examine witnesses. See Goss, 419 U. S. at 583

In their brief the McCains vociferously assert that Amy McCain was not drinking beer and that she was, therefor, unjustly punished by the two-day suspension, which has resulted in further personal problems for her. But whether she was holding a cup of beer is not a question of material fact concerning the issue of procedural due process or concerning any other potential basis for relief. In Wood v. Strickland. 420 U.S. 308, 326 (1975), the Court addresses the role of the federal courts when asked to review decisions of school administrators and stated,

> It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school

> students do not have substantive and procedural rights while at school. (Citations omitted.) But Sec. 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and Sec. 1983 was not intended to be a vehicle for federal court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees. (Citations omitted.)

The McCains' arguments and conclusions asserted on appeal are without merit, and relitigation of the merits of the suspension is not appropriate here. The judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No, 77-2992

Appeal from the United States
District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(November 28, 1989)

Before HIGGINBOTHAM, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED..

ENTERED FOR THE COURT:

J. Smith (sig)

United State Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

AMY McCAIN, et al.,	*	
	*	
Plaintiffs	*	
	*	
VS.	*	CIVIL ACTION
	*	NO. H-88-1796
	*	
HOUSTON INDEPENDANT SCHOOL DISTRICT, et al.,	*	
	*	
	*	
	*	
Defendants	*	

ORDER

Defendants have filed a motion to dismiss supported by the affidavit of Ray Reiner. Plaintiff, pro se, has filed a response and summary judgment evidence in an effort to controvert Defendants' motion to dismiss as a motion for summary judgment, the Court will also treat the motion as one for summary judgment. The motion is GRANTED and this case is DISMISSED.

The facts are not in dispute. Amy McCain, a student at Lamar High School, was

suspended for two days after being allegedly found in possession of alcohol on school property. After Miss McCain was accused of possessing alcohol she was called to the Vice-Principal Bert Busker's office. She was informed of the charges and was given an opportunity to respond. Complaint Paragraph 18. She was informed of Mr. Busker's discussions with Coach Muskett and Mr. Lang who both saw the alleged offense. After this hearing she was suspended for two days. Reiner Affidavit.

That same day Miss McCain had a second hearing before Mr. Busker. At the second hearing she was accompanied by her father. Complaint Paragraph 24. She subsequently had hearings before Mr. Reiner, principal of Lamar, District Superintendent Kay Stripling, and the H.I.S.D. school board. Complaint paragraphs 25, 28, and 29. In each case she was given an opportunity to be heard and present her side of

the incident.

Plaintiff brought suit pursuant to 42 U.S.C. * 1983 alleging civil rights violations. The * 1983 claims must be dismissed since Plaintiff was given more than the minimum due process guaranteed by the Constitution for a suspension of less than ten days. Goss v. Lopez, 419 U.S. 565 (1975). Plaintiff has also alleged violations of 42 U.S.C. ** 1985 (2) (3) and 1986. These claims must be dismissed since a racial or class-based invidiously discriminatory animus has not been plead or demonstrated. Brandt v. Smith, 634 F.2d 796, 800-802 (5th Cir. 1981); cert. denied, 454 U.S. 830.

Plaintiff, in her reponse, asserts violations of her right to petition, illegal search and seizure, equal protection violations, and violations of her right to privacy. Plaintiff has made no factual allegations that would support any of these causes of action.

For these reasons the motion to dismiss, treated as a motion for summary judgment, is GRANTED and this case is DISMISSED with prejudice. Defendants have made a motion for assessment of attorney's fees against Plaintiff but have provided no support. The request for attorney's fees is DENIED.

IT IS SO ORDERED.

Done at Houston, Texas, this 31st day of August, 1988.

NORMAN W. BLACK
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

ANY McCAIN, et al.,	*	
	*	
Plaintiffs	*	
	*	
VS.	*	CIVIL ACTION
	*	NO. H-88-1796
	*	
HOUSTON INDEPENDANT SCHOOL DISTRICT, et al.,	*	
	*	
	*	
	*	
Defendants	*	

FINAL JUDGMENT

Having granted Defendants' motion for summary judgment, this case is DISMISSED. Costs are taxed against Plaintiff.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 31st day of August, 1988.

NORMAN W BLACK
UNITED STATES
DISTRICT JUDGE

SUPPLEMENTAL
STATEMENT OF FACTS

The digest of facts presented to the appellate panel have been compressed to the maximum degree possible and still remain intelligible, we are, therefore quoting, in toto, the facts as presented to that panel.

> "The facts in this case are a peculiar mixture of fact and law. On May 26, 1987 the Houston Independent School District (hereinafter called HISD) had in place an "official" written set of Policies and Procedures, regarding disciplinary matters. At the same time they had in place parallel disciplinary policies and procedures, partially written and partially unwritten, which they actually used to discipline students. The purpose of said underground policies and procedures was to circumvent the legally established rules, regulations, Policies and Procedures, case law, statutory law, and the state and federal constitutional protections afforded students and their parents and representatives. 'R 154; Complaint--none of which has every been denied by defendants)
>
> At the same time, Amy McCain was enrolled in Lamar High School's advanced academic program, had no record of disciplinary problems and

was dependent on her academic and disciplinary record for the opportunity to attend college. (R 149, Par. 20)

Day 1:

'Sometime prior to May (2)6, 1987, a Lamar High School teacher assigned a science project to a student, Brandon _____. On May 26, 1987, the teacher gave Brandon _____ a pass in order to get the science project and bring it to school. Brandon borrowed Tim _____'s car, Tim being another student, to ob(t)ain said project. Brandon _____ brought a beer keg, with some beer in it, onto the Lamar High School campus in Tim _____'s car.' (R 149, Par. 20)

'(The) beer tapper...was part of a science project assigned to him by a teacher.' (34 (R 26))

The borrowed car was Amy McCain's ride home. (R 34) Final examinations were to begin the next day. (R 148)

On May 26, 1987, a Lamar High School coach ordered Amy to pickup an empty cup which had been left in her area. (R 148)

Later that same day Amy was wrongfully and publicly accused by the vice-

principals of (a) illegal consumption and (b) illegal possession of an alcoholic beverage (c) on Lamar High School campus, crimes under the laws of the State of Texas. (R 148, Par. 17)

The "R" in the above quote refers to the transcript record and "Par." to the complaint which is quoted in the fact portion of our Petition Supra.

The Court should note that none of the above grounds are grounds for either suspension or expulsion, which grounds are listed on the next page under "Official" Houston Independent School Board Policies and Procedures.

The Statement of Facts presented to the panel states:

> "With the door to the vice-principal's office left wide open and in the presence of students and other people, neither essential nor party to said proceedings, Amy and other students were threatened with:
>
> (1) Expulsion, for a non-expellable

offense under Texas law.(21:3011, TEC Title 19, Part II--Expulsion for possession, or use on more than one occasion, 21:3011(b)(3)) (Emphasis added)

(2) Arrest;

(3) Suspension;

(4) Denial of their right, under Texas law, to makeup their final examinations. (Title 19, Part II Texas Ed Code 21:301 (a)(10))"

The following is the exclusive grounds for suspension or expulsion and was cited to the Appellate panel;

"On May 26, 1987 the "official" Houston Independent School District Policies and Procedures (R 150, Par. 22) provided:

'Suspension/Expulsion. Decisions to suspend or expel a student shall not be made until':

A. 'There has been a hearing as provided by Section 751.200, Board Policies, involving the principal, the teacher, the student, and his or her parent, guardian or representative.';

B. 'At the hearing, the principal must find that the student';

1. 'has assaulted a teacher or other persons on school property, or';

2. 'has been previously declared incorrigible and has continued to be guilty of incorri(g)ible conduct during or after disciplinary reassignment (long term) to the extent that keeping the student in the program would seriously impair the ability of the school to educate other children and';

3. 'that no further reasonable efforts to educate the child can be made...'

C. 'A copy of the written order suspending or expelling a student must be sent to the Chief Juvenile Probation Officer of Harris County.' (our emphasis) (R 150, Par. 22)

In addition to the mandatory hearing for Suspension and Expulsions described above, Sec. 752.000, HISD Policies and Procedures provided:

'The student's parent or representative is entitled to notice of and to participate in this disciplinary proceeding.' (R 32)

At no time have school officials complied with provisions 'A', 'B'.

In the original confrontation, during the investigatory state of the proceedings, the 'minimal due process' was not provided. Amy denied the charges saying, '...the cup was empty, except for the smell of beer, and she was not holding the cup.' (R 51, 148) Rather than explaining any evidence which Mr. Busker had, exculpating Amy, Mr. Busker

'...change(d) the story a few times.' (Affidavit R 51; R 148, Par. 18) and the vice-principals '...wouldn't even let them tell their story.' Affidavit R 51; R 148, Par. 18)

Day 2: May 27, 1987, in the morning, Amy was suspended without a hearing, without proper notice, and without first considering reasonable alternatives under TEC 21:301 (c). Later that same morning Mr. McCain went to vice-principal Busker's office where Mr. Busker told him that he suspended Amy, not because of misconduct but because:

> '...he needs more information and that a "hearing" would be set later when the student would be told what the investigation revealed, then he would decide on what (further) punishment he would give and whether Amy would be allowed to makeup her tests.' (R 149, Par. 21)

Although Mr. Busker had already talked to Coach Muskett and Mr. Lang, he admitted to Mr. McCain that:

> '"He knew that Amy did not have a cup of beer while on the Lamar campus, he would never-the-less allege that she had said cup of beer.' Mr. Busker became very antagonistic and threatened to retaliate against (Mr. McCain's) daughter if (he) complained about the suspension.' (R 34, R 44)" (see also R 149, Par. 21)"

THE UNREFUTED FACTS AND THEN:

1. THE SCHOOL BOARD NEVER EVEN CLAIMED

THAT AMY McCAIN'S CASE CAME WITHIN THE MANDATORY AND EXCLUSIVE GROUNDS FOR SUSPENSION OR EXPULSION LISTED ON THE PRECEDING.

2. AS A MATTER OF LAW AMY McCAIN STANDS INNOCENT OF THE CHARGES WHICH THE SCHOOL DID MAKE, BY REASON OF THE DEFENDANTS-APPELLANTS FAILING TO FILE AN ANSWER IN DENIAL, SO THAT THIS CASE IN NOT NOW AT ISSUE, AND EVERY SINGLE FACT ALLEGED IN AMY McCAIN'S COMPLAINT STANDS ADMITTED FOR PURPOSES OF THIS PROCEEDING.

The Statement of Facts before the Appellate panel continues:

"After threatening Amy he stated:

> '...it would not be in her best interests to remain at Lamar and he offered to prepare papers for her transfer right then and there.' (R)

In the evening of May 27, 1987 Mr. McCain was served with written notice of suspension in which Mr. Busker accused Amy of:

> "Possession of cup of beer-Lying to an administrator"

The exhibits at R 46, 47, and 48 were attached. A check mark was made beside the following, on R 48:

> "Formal discipline hearing as provided in Sec. 751.200 Board Policies (Mandator)." (sic.)

The word "(Mandatory)" was boxed in.

> "...the open ended suspension...said that Mr. McCain would need to call his office for an appointment for a 'conference' before May 29 and before Amy could be considered for readmission to school." (R 149, Par. 22)

Day 3: May 28, 1987

> 'In early morning on May 28th I found I could not get a meeting with Mr. Busker until May 29th, thus effectively causing a suspension of 3 days instead of 2, this was test week and tests start in the morning. Mr. Busker was unavailable when I learned of this extension of Amy's suspension without so much as a stroke of a pen, because of Mr. Busker's making good his threat to retaliate by effectively adding an additional suspension day, because of him making good his threat to allege charges which he knew were not true and because of the importance of final examinations I decided to allege an emergency and ask for immediate reinstatement...I filed 'Exhibit "A" (R 44) about 3 p.m.'"

(Part of page 9 and 10 were omitted here in the interest of brevity.)

> "Mr. McCain filed his motion for recusement on May 28, 1987:

(Please note that Mr. McCain's motion was under oath.)

> 'After repeated refusals of vice-

principal Busker to answer phone calls inquiring as to the nature of the "formal hearing" set for May 29, 1987, the plaintiffs filed a sworn motion under HISD Policies and Procedures Sec. 756.000 for a (a) Recusement, (b) Recorded hearing, (c) Sworn testimony, and (d) Immediate reinstatement and expungment of the record. The motion was filed before defendants, principal Ray Reiner, vice-principal Bart Busker, and assistant superintendent (cluster manager) Kaye Stripling.' (R 150, Par. 23, R 44, 45)

Day 4: May 29, 1987:

'Although the plaintiffs' motion alleged facts showing bias and prejudice of Bart Busker, the motion was ignored. Mr. Busker, acting as prosecutor and judge, held a hearing on May 29, 1987 in which he affirmed the suspension of May 27, without the school submitting any evidence and without allowing the student to submit evidence or make argument. Amy was placed on probation but not notified of that fact.' (R 150, 151, Par. 27; Affidavit R. 50)

'Mr. Busker only waived two papers in the air without allowing examination so that cross-examination was not possible.' (R 38)

'At the above "hearing" Mr. Busker gave (Mr. McCain) "Exhibit C" which he said justified what he had done." (R 36) '(but)...had in fact been superceded in February 26 of 1987 by a letter signed by W. N. Kirby,

Commissioner of Education for the State of Texas.' (R 36)

The letter had authorized hearing officers to base suspension on 'feelings' rather than a preponderance of the evidence. (R 62) On May 29, 1987 the plaintiffs appealed the decision of vice-principal Busker to the 'next superior officer' principal Reiner.

Day 7 and 9: June 1 and 4, 1987 respectively:

"...a hearing was held on June 1, 1987 and continued to June 4, thereupon defendant Reiner conducted a secret investigation in concert with the "Vice-principals", and in concert with the "vice-principals" they did conspire to find Amy McCain guilty of the accusations based on evidence accumulated ex parte and in secret, in violation of HISD Board Policy and Procedure Sec. 756.000";

'In order to justify the suspension of May 27, one or more of the defendants manufactured a case against Amy McCain by engaging in an inquisition type, ex parte hearing where:

(a) Evidence was accumulated and decisions made in secret;

(b) Identities of witnesses were secret;

(c) Their testimony was kept secret;

(d) Accusations, arguments and decisions were made in secret, by a

tribunal that was partially identified and partially unidentified; and, under an evidentiary test based on the "feelings" of said tribunal, Amy McCain was told on June 4, 1987 that she had been foun(d) guilty of being "...involved ("and(") to what degree...is totally inconsequential.';'

"The burden of proof was shifted to the student requiring her to:

(a) Take a lie detector test to prove her innocence;

(b) Present evidence under HISD Procedures Sec. 756.000, '...upon which the hearing officer can establish that the student did not do the alleged act" (our emphasis);

(c) Anticipate and meet evidence and legal issues presented in an inquisitional hearing before the vice-principals and Mr. Reiner, which she or her representatives were not allowed to attend and in which hearing the vice-principals and Mr. Reiner acted as the police, the prosecutor and judge;

(d) Require Amy McCain to prove her innocence without a prima facie case having been made against her'. (R 151)

Plaintiffs filed their Petition for Grievance with Principal Reiner, pursuant to a 'Grievance' procedure under HISD Policies and Procedures, Sec. 740.100, Mr. Reiner refused to consider this Grievance or set it for hearing saying,

'You do not have a standing to file a grievance against the principal.' (R 58)

Day 30: June 24, 1987:

Plaintiffs filed, with the HISD Board, their appeal of the disciplinary decision of Ray Reiner, along with a certified record, Praecipe for Transcript and Legal Brief, which the HISD Board refused to set for hearing or consider. The brief contained the following citations of Board Policies and Procedures and analysis:

> 'Article 4, HISD Board Policy at Sec. 752 provides, "The Board or its designate may not suspend or expel a student except as provided in Policy Section...756.000" '

Page 37 of the Transcript contains part of the 54 pages of the true record of the proceedings, none of which the Board considered.

"ADMINISTRATIVE PROCEDURE SEC. 756.000

Sec. (a)
'The evidence offered at the hearing should be directed toward finding the truth...The key to conducting a successful hearing is to search for the truth through reasonableness and fairness.'

Sec. (b)
'The student is entitled to an impartial hearer of the facts...If in doubt about

whether the administration acts, judgments or decisions are at issue or if the administration cannot conduct a fair and impartial hearing, the administrator should not conduct the hearing. The entire thrust of having a hearing is to have someone conduct it who is impartial and can render a fair decision.'

WHAT LAMAR HIGH SCHOO(L) DID

The only evidence of record was a verified 'Motion For Change of Venue From the Hearing Officer' stating:

> 1. Bart Busker was biased and prejudiced; 2. Mr. Busker asserted that...'even though he knew Amy Elizabeth McCain did not have a cup of beer on the Lamar High School campus 'he would never-the-less allege that she had said cup of beer'; 3. Mr. Busker was a potential witness in these proceedings; (Student's Verified Exhib A) Mr. Busker refused to disqualify himself in this case.

Sec. (d)
'A record of the hearing should be made to substantiate that the required elements of procedural due process are afforded the student.'

> Mr. Busker failed to record said proceedings although 'Exhib. A' asked for recorded statements.

Sec. (e)
This section provides for hearings that '...will be closed to the public.'

> Mr. Busker in the presence of other students, not privy or necessary to

the proceedings, held a 'hearing' on 5-24-87 in which he accused Amy McCain of 'drinking beer and possession of an alcoholic beverage.' (Exhib. F and A)

Sec. (g)
'The hearing officer should permit cross-examination if any circumstances indicate it necessary in order to reach the truth or to otherwise conduct a hearing that is fundamentally fair. If even in doubt as to whether cross-examination is necessary, permit it; to do otherwise is to invite litigation.'

Sec. (h)
'Witnesses should be sworn before offering testimony.'

Both Mr. Busker and Mr. Reiner violated the request of Amy McCain in Exhibit 'A'.

Sec. (i)(2)
This section anticipated that '...the record will adequately reflect the reasons for the proposed action, to substantiate that all parties had notice of the proposed reasons and possible punishment...'

We had no idea as to the nature of the action of 5-29-87. Exhib. 'B-1(') said we were to have a conference and The Student Code (Exhib. B-4) showed 'formal discipline hearing.(') We had no idea as to whether this was merely a formal conference to get Amy back in school or whether she risked additional suspension or expulsion since the sections referred to provided for them. To add to the

problem, Mr. Busker would not answer phone calls made to him. With no guidance from Mr. Busker we checked the papers served and found that Exhib. 'B-3) provided on page 13, 'Decisions to suspend or expel a student shall not be made until there has been a hearing...'

Sec. (i)(3)
'The witnesses for the administration then present their evidence which support the reasons given for the proposed reassignment or expulsion...The names of the administration witnesses together with a general description of their testimony must be given to the student in advance of the hearing so he or she can prepare for an adequate defense.'

I could go into a tirade here, but what is the point---The fact is that this section was not followed nor were any of the other Board policies or procedures.

Sec. (j)
This section provides that the '...action must be supported by substantial evidence.' It further says that the '...hearing officer may take into consideration only that evidence presented at the hearing. The Hearing Officer should not consider rumor or other suggestion heard outside of the room prior to or after the hearing...evidence which would be hearsay or irrelevant in the courtroom should not be used to establish a fundamental fact upon which the decision is based. Hearsay evidence and affidavits may be used only to support a fact which is

otherwise independently established through direct testimony or documentary evidence.'

> Let's face it. Mr. Busker submitted absolutely NO evidence to support the charges levied against Amy Elizabeth McCain. No attempt was made to present evidence until the appeal state before Mr. Reiner, when he submitted two unverified, conflicting statements, one signed and one initialed(.)
> These were not competent evidence because they were not sworn affidavits and even if they had been affidavits they could not be used because of the provision ...(above)...which is underlined.
> On the other hand the case of the school was denied at the Busker hearing and is supported by affidavits supported by the testimony of Amy McCain, constituting 'direct' evidence." (R 37, 38 and 39)

Finally the Statement of Facts before the Appellate panel said:

"Instead of the Board hearing the appeal it set up a fake, unauthorized hearing before District Superintendent Kay Stripling(;) a false record was substituted for the actual record.

(A)n appeal of Ms. Stripling's adverse ruling was made again to the School Board and the false record was substituted to the Board. (R 152, 153, Par. 31, 31, 33)

The Board in a hearing continued from Nov. 6, 1987 to Feb. 19, 1988 refused to

take judicial notice of the record filed before it and before Kaye Stripling or to consider any of the evidence or briefs filed by the student prior to the hearing."

In addition to the disciplinary appeal we filed a Petition for Grievance before Principal Reiner, Asst. Supt. Stripling General Supt. Raymond and before the School Board, no one, including the Federal Judiciary has addressed our equitable prayer for expungment of the Schools records.

> "Your grievance procedures provide a 5 day per(iod) to set a hearing and another 5 days to make a decision. If no decision is rendered the grievant may automatically appeal to the next level. Sec. 740.100 HISD Policy says, 'The number of days indicated at each level shall be considered a maximum.'
>
> This case has been (be)fore the General Superintendent since July 7, well over the 10 days set as maximums by your own rules....
>
> The grievance was filed June 10 and we have yet to find one school administrator making a decision on the merits.
>
> The Board already has a copy of the

grievance in its possession and we are incorporating this copy by reference in our appeal to you and request that you meet with us." (Transcript Record p. 72) (See page of this Statement of Facts, next to the last paragraph)

Amy McCain and her father, 2 1/2 years later stand at the door of this Court waiting for our "Petition For Redress of Grievance" to be heard or even acknowledged.

7. One or more of the defendants herein, under color of the statutes, ordinances, regulations, custom or usage of the State of Texas and the HISD, has subjected and caused to be subjected one or more of the plaintiffs, citizens of the United States and the State of Texas, to the deprivation of rights, privileges or immunities secured by the Constitution and the laws, in a manner hereinafter set out;(42 U.S.C. 1985)

8. Two or more of the defendants conspired with one or more of the other defendants or other unnamed persons for the purpose of impeding, hindering, obstructing or defeating the due course of justice, within the State of Texas, with the intent to deny Amy McCain, her father or other representatives, and others similarly situated, to the equal protection of the laws by one or more of the acts

hereinafter listed; (42 U.S.C. 1985(2)

9. Two or more of the defendants conspired to, for the purpose of depriving, either directly or indirectly Amy McCain or William R. McCain, and others similarly situated, the equal protection of the laws or equal privileges and immunities under the laws or for the purpose of hindering the constituted authorities of the State of Texas from giving or securing the plaintiffs' right to equal protection of the laws, whereby said defendants acted to the injury of said plaintiffs in their person or property or deprived plaintiffs of having and exercising their rights and privileges, all as hereinafter set out; (42 U.S.C. 1985(3)

10 One or more of the defendants, having knowledge of the wrongs conspired to be done in paragraphs 8 and 9, were about to be committed, and having power to prevent or aid in the preventing the commission

of same, neglected or refused so to do. Said defendants, by reasonable diligence could have prevented said wrongful acts from being committed so that the Plaintiffs, Amy McCain or her father William R. McCain were damaged as a result, all as hereinafter set out: (42 U.S.C. 1999)

11. The defendants conspired to and did, under color of law, willfully and wantonly engage in invidiously discriminatory acts which were intended to and did, in fact, deprive students, their parents or representatives, or others similarly situated of their constitutional rights of privacy, due process, illegal search and siezure, equal protection and right to petition for grievances. The defendants willfully and wantonly deprived the plaintiffs of their liberty and property rights under the law. Pursuant thereto, said defendants deprived plaintiffs of adequate notice, their right to a fair and impartial hearing before a fair and

impartial hearing before a fair and impartial tribunal. They engaged in the manufacture and suppression of evidence, extortion, intimidation and threats against witnesses and parties; they held secret meetings, hearings, and investigations in which they made secret decisions and conclusion of law and fact, prior to or during hearings, which were based on their feelings and without any competent evidence, thereby denying Amy McCain and others the right to confrontation, cross-examination and other procedural rights;

12. On or about May 26, 1987 the Houston Independent School District has in effect a wholly illegal policy with was intended to and did, in fact, isolate students in the school environment from the protection of their parents and natural guardians, and from the protection provided by the laws of the State of Texas and from the state and United States Constitutions;

13. In order to hide their malicious and despicable actions they failed to keep records of filings, hearings and other proceedings and they substituted a false record for appellate or judicial revue. On May 26, (1987) and for a long time prior thereto, the Houston Independent School District, their Board of Directors, officers, agents, designees, employees and representatives engaged in a policy which placed exclusive control of disciplinary policies or procedures in the hands of local school authorities, including Lamar High School. The purpose of said policy was to circumvent the law and to deny students, their parents and representatives access to and the benefit of Federal and State Constitutional protections as well as State law and Texas Education Agency and HISD regulations, policies and procedures;

14. One or more of the defendants at the

Board level, as well as Administration authorities and the school attorneys, engaged in activities which they knew or reasonably should have known that the action that they took, or intentionally refused to take, within their respective spheres of official responsibility would violate the constitutional rights of the said Amy McCain, her representatives, and others similarly situated;

15. Said defendants at the Board level agreed to accept, and the defendants agreed to submit a record of the procedings below which all conspirators knew was a false and manufactured record. The practice of submitting false, inaccurate and incomplete transcripts of the record was so well known that when, then Board resident, Cathy Mineburg described the achools transcript as ". .cards, memos, physical evidence. .and other evidence", the school Board broke into laughter;

16. On or about May 26, 1987, the day before final examinations were to begin, a student brought onto Lamar High School campus a beer keg, which was to be used to demonstrate a beer keg tapper which he had been asked to design as part of a class project;

17. At said time and place Amy McCain was wrongfully accused of:

> Illegal consumption and possession of an alcoholic beverage on the Lamar High School campus

crimes under the laws of the State of Texas;

18. Said accusations along with threats of arrest, suspension or expulsion were made in the presence and hearing of students and other people who were neither party to nor essential to the proceedings. With the door to the vice-principal's office left wide open Mr. Brew and Mr. Busker accused Amy McCain and other students ". .of drinking beer. They never

asked if they were; they wouldn't even let the(m) tell their story. .Mr. Busker change(d) the story a few times. .With out having talked to Coach Muskett and Mr. Lang, except (sic) over the walkie talkie Mr. Busker had already accused Amy McCain of possession of aschol. (sic) Amy told him the cup was empty, except for the smell of beer, and she was not holding the cup.";

19. On May, (27) 1987 Amy McCain was suspended without a hearing and without proper notice and she was threatened with denial of her right to make-up her examinations in violation of the Texas Education Code, Sec. 21.301:

20. At said time Amy was enrolled in Lamar's advanced academic program, has no record of disciplinary problems and was dependent on her academic and disciplinary record for the opportunity to attend college;

21. At a meeting later that morning with Amy's father, William R. McCain, vice-principal Bart Busker said he was going to accuse Amy of possession of a cup of beer, although he admitted he knew the cup was empty and picked up at the direction of the Lamar High School coach. He threatened to retaliate against Amy if the plaintiffs did not drop their objections to the suspension. Mr. Busker said he suspended Amy because he needed some more information and that a "hearing" would be set later, when the student would be told what the investigation revealed, then he would decide on what punishment he would give and whether Amy would be allowed to make-up her tests. Mr. Busker then engaged in an investigation, the purpose of which was to justify his wholly illegal actions;

22. In the evening of May 27, 1987, Amy's father was served with written notice of

the open ended suspension which said that Mr. McCain would need to call his office for an appointment for a "conference" before Amy could be considered for readmission to school. Amy was accused of:

> "Possession of cup of beer-Lying to an administrator"

Said notice included pages 10 through 15 which provided the possibility of expulsion and stated on page 13:

> "Suspension/Suspension. Decisions to suspend or expel a student will not be made until there has been a hearing as provided by Section 751.200, Board Policies, involving the principal, the teacher, the student, and his or her parent, guardian or representative. At the hearing, the principal must find that the student has assaulted a teacher or other persons on school property; or has been previously declared incorrigible and has continued to be guilty of incorrigible conduct during or after disciplinary reassignment (long term) to the extent that keeping the student in the program would seriously impair the ability of the school to educate other children and that no further reasonable efforts to educate the child can be made. .The hearing officer should inform all parties of their right to appeal the decision to the next higher administrative level and how to do so. .A copy of the writ-

ten order suspending or expelling a student must be sent to the Chief Juvenile Probation Officer of Harris County."

Page 13 also provided:

"Declaration of incorribibility. To find a student guilty of incorrigible conduct and subject to long term disciplinary reassignment or suspension, the principal must hold a hearing. . and find that either (1) the student's continued presence presents a clear, present, and continuing danger of physical harm to the student or others, or (2) the student has engaged in serious or persistent misbehavior that threatens to impair the educational efficiency of the school, the misbehavior violates specific, published standards of student conduct for the District, and all reasonable alternatives to the student's regular classroom program, including a variety of disciplinary actions have been exhausted."

23. After repeated refusals of vice-principal Busker to answer phone calls inquiring as to the nature of the "formal hearing"set for May 29, 1987, the plaintiffs filed a sworn motion under HISD Policies and Procedures Sec. 756.000 for a (a) Recusement, (b) Arecorded hearing, (c) Sworn testimony, and (d) Immediate

reinstatement and expungment of the record. The motion was filed before defendants, principal Ray Reiner, vice-principal Bart Busker, and assistant superintendent (cluster Manager Kaye Stripling;

24. Although the plaintiffs' motion alleged facts showing bias and prejudice of Bart Busker, the motion was ignored. Mr. Busker, acting as prosecutor and judge, held a hearing on May 29, 1987 in which he affirmed the suspension of May 25, without the school submitting any evidence and without allowing the student to submit evidence or make argument. Amy was placed on probation but not notified of that fact;

25. The plaintiffs appealed the decision to defendant principal Ray Reiner and a hearing was held on June. ,1987 and continued to June 4, whereupon defendant Reiner conducted a secret investigation

in concert with the "vice-principals" they did conspire to find Amy McCain guilty of the accusation based on evidence accumulated ex parte and in secret, in violation of HISD Board Policy and Procedure Sec. 756.000;

26 In order to justify the suspension of May 27, one or more of the defendants manufactured a case against Amy McCain by engaging in an inquisition type, ex parte hearing where:

(a) Evidence was accumulated and deliberations made in secret;

(b) Identities of witnesses were secret.

(c) Their testimony was kept secret;

(d) Accusations, arguments and decisions were made in secret, by a tribunal that was partially identified and partially unidentified; and, under an evidentiary test based on the "feelings: of said tribunal, Amy McCain was told on June 4, 1987 that she had been found guilty of being". .involved. .and. .to what degree. .is totally inconsequential."

27. The burden of proof was shifted to the student requiring her to:

(a) Take a lie detector test to prove her innocence;

(b) Present evidence under HISD Procedures Sec. 756.000, "..upon which the hearing officer can establish that the student did not do the alleged act."

(c) Anticipate and meet evidence and legal issues presented in an inquisitional hearing before the vice-principals and Mr. Reiner, which she or her representatives were not allowed to attend, and in which hearing the vice-principals and Mr. Reiner acted as the police, the prosecutor and the judge:

(d) Requiring Amy McCain to prove her innocense without a prima facie case having been made against her;

28. Although HISDPolicies and Procedures provide only for an evidentiary hearing, a second hearing denovo, then an appeal on the record to the HISD Board, a fake or unauthorized appellate hearing was set up before district Superintendent Stripling. The purpose of the fake appellate hearing was the substitution of a false record for the actual record before vice-principal Busker and Principal Reiner. Neither the fake record nor the

actual record, submitted in transcript form by the student, showed any competent evidencd submitted by the school. Never-/ the-less Ms. Stripling ruled against the plaintiffs and substituted the false record to the School Board;

29. On November 6, 1987 at the appeal hearing before theHISD Board, the defendents substituted a false, inaccurate, incomplete and uncertified record of the proceedings made before Mr. Reiner and Mr. Busker along with an inaccurate, garbles, incomplete and uncertified transcript of the arguments made in the fake hearing before District Superintendent Stripling. Not only did the school substitute a false record for the actual record, they failed to present the record of the transcript of the recorded hearing sessions before principal Reiner. Mr. Reiner then in open hearing before the Board lied about the session bein recorded;

30. On February 19, 1988 an appeal hearing, continued from November 6, 1987, was held before the Board at which an uncertified, inaccurate rendering of the missing tape recordings was finally produced. The Administration refused to submit, and the HISDBoard refused to consider t he student's transcript of the actual record of the hearings held below. They further refused to consider any of the pleadings, briefs or affidavits, notices, official documents, or evidence submitted before Mr. Reiner, Mr. Busker, those filed with district superintendent Stripling on June 26, 1987, those filed with the Board on June 24, 1987 or those filed with the Board or general superintendent Joan Raymond after said date;

31. Without objection from any of the defendant Board members, the Board refused to take judicial notice of the ac-

tual record filed before the HISD Board, and before defendants: Bart Bunker, Ray Reiner, Kaye Stripling, Joan Raymond and Director of Board Services, Les Sumrall, or to otherwise aid the student in enforcing her Praecipe For Transcript;

32. In spite of plaintiff' motion for information on procedural rules and school policies, along with the praecipe for a transcript filed on June 24, 1987 before the Board and renewed on July 8 and August 28, the HISD Board and Administration, their agents, employees, designees or other representatives have failed and refused to furnish plaintiff said information, and they have failed and refused to furnish an accurate, complete or certified transcript of the record of the proceedings, in this case or to consider the actual record in their decision to deny Amy McCain's appeal to reverse the suspension and expunge the record;

33. The HISD has had in effect the following policies and procedures which were designed to and did virtually eliminate, or, in fact eliminate appeals before the School Board in student disciplinary cases, to wit:

(a) Students were suspended without meaninful hearings and without first considering reasonable alternatives, including appropriate discipline management techniques or removal to an alternative education program, in violation of the Texas Education Code Sec. 21.301, the Texas Education agency rules and the Texas Administrative Code;

(b) The defendants then relied on a system of policies and procedures which were complicated, arbitrary, confusing or contradictory so as to require prohibitive or extensive expenditure of funds for effective legal representation in order to protect the rights of Amy McCain or others

similarly situated;

(c) The defendants engaged in a practice of stalling or otherwise refusing to act on a manner prescribed by law, policies or procedures, or administrative regulations, so as to protract the due course of justice, thereby discouraging students or their parents and representatives; or requiring extensive or prohibitive expenditures of monies for legal expenses to enforce or attempt to enforce the rights of Amy McCain or others similarly situated;

(d) The defendants failed and refused to protect the record or otherwise failed to preserve or consider the actual evidence, or accurately document evidentiary submissions, transcripts, petitions, briefs or other parts of the record, by failing to keep a record of said events or to lie about the filing or existence thereof;

so that student disciplinary appeals have not been prosecuted to the HISD board for a number of years in a school system composing some 190,000 students;

34. On or about May 26, 1987 the Houston Independent School District had in place a written set of Policies and Procedures regarding disciplinary matters. At the same time they had in place parallel and underground policies and procedures, partially written and partially unwritten, which they actually used to discipline students. The purpose of said underground policies and procedures was to circumvent the legally established rules, regulations, Policies and Procedures, case law, statutory law and state and federal constitutional protections afforded students and their parents and representatives:

35. The kaystone of said underground policies was a contrived effort to hide the

actual record in disciplinary proceedings in order to limit or obliterate appeliate review; and, in order to supply deniability and avoid responsibility for unlawful conduct of the defendants at both the trial and appellate stages;

36. This lawless and invidiously discriminatory policy was well understood by all of the defendants and was engaged in, under color of law, in order to deprive students and parerts of their constitutional protections, including;

(a) Right to petition, 1st Amendment,

(b) Right to Privacy,

(c) Right to be secure from illegal searches and seizures, 4th Amendment,

(d) Right to due process, 5th and 14th Amendments,

(e) Right to equal protection, 14th Amendment;

37. On or about May 26, 1987 t here was in force and effect a Code Of Ethics Pro-

vides as follows:

"(e) Ethical conduct toward students:

(2) The educator shall deal considerately and justly with each student and shall seek to resolve problems including discipline according to law and school board policy.

(3) The educator shall not intentionally expose the student to disparagement.

(4) The educator shall not reveal confidential information concerning a student unless disclosure served professional purposes or is required by law.

(6) The educator shall endeavor to present facts without distortion." TAC 19 Sec. 177.1;

38. One or more of the defendants engaged in the violation of the law as well as violation of the above ethical standards. One or more of the defendants then engaged in illegal and unethical acts in order to cover-up the illegal and unethical acts of others.

39. Pursuant to said coverup defendants at the administrative level agreed to

fabricate and present to the School Board a manufactured and false record of the proceedings involving the discipline of Amy McCain. As part of the conspiracy t he defendants at the School Board level agreed to accept the administrations transcript of the record at face value and to ignore the actual record filed before it. The administration defendants and the Board level defendants agreet to accept legal opinions from the legal representatives of the Houston Independent School District and said legal representatives agreed to give opinions which both sides knew or had reason to believe were wrong, so that said defendants could rely on the legal opinions given. The attorneys expected to rely of the reluctance of follow attorneys to sue one another, and the reluctance of courts to hold attorneys accountable for bad advice under the doctring of qualified immunity, thus avoiding responsibility at each level;

40. The plaintiff alleges that the acts in the case of Amy McCain were an effort to circumvent the admonition of the Federal Court given 17 years ago to the Houston Independent School District with Kelly Frels as the attorney of record in that case:

> ", ,The tendency of virtually every administrative appellate body to affirm the decisions rendered at a lower level means that it is particularly vital that the initial hearing offered a suspended student be a meaningful one, The court is persuaded that it is unrealistic to expect that such a hearing can be meaninful when prosecutor and judge are united in the same individual.
>
> The Court. .recently held that a meeting between a principal, and a suspended student, and the student's parents, in which the principal merely explained to the parents the decision he had already reached did not qualify as a 'hearing', even though denominated as such by the principal. The Court did not deal with the question of whether the principal should be permitted to conduct a hearing for the student whom the principal has himself decided to suspend. This Court believes, however, that it is practically inevitable that a principal who as prosecutor has adjudged a student in need of suspension, will, as judge affirm his own prior ruling." Sullivan v. HISD, TX

(1971) 333 F. Supp. 1149, 1174

41. Defendants' conduct as hereinbefore set forth was intentional or reckless and so extreme in degree as to go beyond all reasonable bounds of decency and caused the plaintffs severe emotional distress by reason of the acto of intimidation, humiliation and public scorn and redicule before fellow students, teachers and other persons. The defendants have violated their public trust and have committed an outrage against Amy McCain and other students of the Houston Independent School District by creating a system of lies, deceit, slander, coverup, threats, intimidation and extortion against Amy McCain and other students and their parents and representatives. The defendants, and each of them, knew that they were engaging in destructive acts which would cause and in fact did damage Amy McCain's opportunities and scholarship chances for higher educa-

cation along with damage to her employability. The defendants have deprived her of parental association and guidance. She has been accused of immoral acts in the presence of her family and required to leave Houston so that the family santuary has been invaded and the familial fabric ruptured. Amy's father, William R. McCain has been assaulted, glared at and threatened and required to miss work and spend many hours to protect her rights causing him loss of income past and future and he has and will be required to spend excessive monies for her college. He has spent and will be obligated to expend monies in her legal defense and in pursuing her legal rights. Both plaintiffs have suffered past and future emotional pain and suffering. As a result of the public accusations some now believe that Amy McCain was arrested and thrown in jail for dope related offenses."

Supreme Court, U.S.
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No. 89-1790

In The

Supreme Court of the United States

October Term, 1989

AMY McCAIN, ET AL.,

Petitioners,

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Houston Independent School District, *et al.*, file this their Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners Amy McCain and William R. McCain.

INTRODUCTION

Petitioners filed this action claiming a denial of due process associated with the two day suspension of Petitioner Amy McCain from Lamar High School in Houston, Texas for possession of alcohol on school premises. Petitioners are asking this Court to examine the holding of the district court in granting a summary judgment and the holding of the court of appeals in affirming that decision. The district court converted Respondents' Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure into one for summary judgment, and granted summary judgment for Respondents where Petitioners failed to state a cause of action, and failed to produce evidentiary support for their claimed deprivation of due process.

The claimed deprivation of due process is apparently founded on the failure of Respondents to accept Petitioners' version of the facts. Petitioners also appear to claim that they were not granted a proper hearing. Petitioners admit in their complaint, however, that four separate hearings were held, each of which was sufficient to meet the requirements of *Goss v. Lopez*, 419 U.S. 565, 95

S.Ct. 729, 42 L.Ed.2d 725 (1975). Based upon the standards set forth in *Goss v. Lopez*, and Petitioners' admissions regarding the hearings held, the district court was correct in granting summary judgment and the court of appeals was correct in affirming the district court's decision. For these reasons, the Petition for Writ of Certiorari should be dismissed.

I.

A TYPOGRAPHICAL ERROR IN THE APPELLATE COURT DECISION DOES NOT WARRANT REVIEW BY THIS COURT

Petitioners claim that the Court of Appeals for the Fifth Circuit committed reversible error by adding the word "not" to a quote from the opinion in *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214, *reh'g denied*, 421 U.S. 921, 95 S.Ct. 1589, 43 L.Ed.2d 790 (1975). The court of appeals stated that, " '[p]ublic high school students do *not* have substantive and procedural rights while at school.'" *McCain v. Houston Independent School District*, No. 88-2992, slip op. at 7 (5th Cir. Oct. 18, 1989) (emphasis added), *quoting*, *Wood v. Strickland*, 420 U.S. at 326, 95 S.Ct. at 1003, 43 L.Ed.2d 214. As a result of this insertion, Petitioners claim that the Court of Appeals "declared the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States to be a nullity." Petition at 26.

A review of this portion of the court of appeals' opinion clearly reveals that the court did not intend to declare the Fourteenth Amendment to be null. The court cites *Wood v. Strickland* to define "the role of the federal

courts when asked to review decisions of school administrators. . . . " *McCain v. Houston Independent School District*, No. 88-2992, slip op. at 7. The portion of *Wood v. Strickland* quoted by the court of appeals states that "[42 U.S.C.] § 1983 was not intended to be a vehicle for federal court corrections of errors in the exercise of [the discretion and judgment of school administrators and school board members] which do not rise to the level of violations of specific constitutional guarantees." *Id.; quoting, Wood v. Strickland*, 420 U.S. at 326, 95 S.Ct. at 1003, 43 L.Ed.2d 214. Clearly the court of appeals quoted *Wood v. Strickland* to establish the standard of review in school discipline cases; the accidental inclusion of the word "not" does not affect this standard, and the opinion of the court of appeals does not endanger the validity or integrity of the Fourteenth Amendment to the Constitution of the United States. Neither does this typographical error affect the citizenship rights of the McCains, or the constitutional rights of students and their parents in general. The district court properly dismissed this claim.

II.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BASED UPON THE PLEADINGS, AFFIDAVITS AND OTHER EVIDENCE PRESENTED TO THE COURT BY THE PARTIES

Petitioners claim that both the district court and the court of appeals "invaded the province of the jury by weighing the evidence alleged in Petitioner's Complaint by arbitrarily deciding what part of the Petitioner's Complaint and supporting evidence they would choose to believe. . . . " Petition at 31. Petitioners further claim that Respondent "HISD failed to file an answer in denial in

this case, nor did they file affidavits or other evidence to refute Petitioner's evidence." Petition at 18-19.

As Petitioners correctly note, Respondents filed their Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on June 9, 1988. In response, Petitioners filed their Memorandum in Opposition to Motion to Dismiss on June 28, 1988. Although Petitioners claim that no evidence was introduced, Petitioners admit that both parties introduced evidence by affidavit. Petition at 9. Upon reviewing the pleadings and affidavits of the parties, the district court stated that, "[s]ince both sides have treated the motion to dismiss as a motion for summary judgment, the Court will also treat the motion as one for summary judgment." *McCain v. Houston Independent School District*, No. H-88-1796, slip op. at 1 (S.D. Tex. Aug. 31, 1988), *aff'd*, No. 88-2992 (5th Cir. 1989). The district court found that the material facts were not in dispute, and based upon the pleadings and affidavits submitted by the parties, the district court granted summary judgment in favor of Respondents. *Id.* at 2.

A district court may convert a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure into one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure where matters outside the pleadings are presented to the district court, and the district court does not exclude such evidence. *Carter v. Stanton*, 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972). In this situation, the parties are entitled to notice of the conversion. *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186 (5th Cir.) *cert. denied*, ___ U.S. ___, 109 S.Ct. 310, ___ L.Ed.2d ___ (1988). In *Clark v. Tarrant County, Texas*, 798 F.2d 736 (5th Cir. 1986), the

court found that the parties were on notice that the motion to dismiss would be treated as a motion for summary judgment when the court accepted testimony on the issue. In the instant case, Petitioners first introduced the affidavit of Amy McCain; Respondents introduced the affidavit of Ray Reiner. Petitioners waived any claim of surprise that the motion was treated as one for summary judgment by submitting evidence in support of their allegations. Following the submission of the affidavits, Petitioners stated that Respondents were treating the Motion to Dismiss "as a *Motion for Summary Judgment* by adding an affidavit to their speaking motion." Memorandum in Opposition to Defendants' Supplement to Motion to Dismiss at 1 (emphasis in original). Clearly Petitioners were on notice of the pending summary judgment at that time, which was twenty-three days before judgment. The district court properly considered the motion to dismiss as one for summary judgment.

III.

RESPONDENT HOUSTON INDEPENDENT SCHOOL DISTRICT PROPERLY NOTIFIED THE PETITIONERS OF THE PROPOSED HEARINGS, AND PROPERLY HELD HEARINGS SUFFICIENT TO SATISFY THE PETITIONERS' DUE PROCESS RIGHTS.

In their Petition, Petitioners appear to claim that either the notice or the hearing did not satisfy the Petitioners' constitutional rights to due process. These due process requirements are defined in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). The *Goss v. Lopez* court defined minimal due process as requiring:

> in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he

> denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

419 U.S. at 581-582, 95 S.Ct. at 740, 42 L.Ed.2d 725. In the instant case, Petitioners were afforded the degree of due process prescribed by *Goss v. Lopez*. In their Petition, Petitioners state that:

> Amy and other students were sent to the vice-principal's office where . . . they were publicly ridiculed and *accused* of possession and consumption of beer by vice-principals Burkes and Brew.
>
> Amy told them that she did not have possession of the cup and only picked it up at the direction of the coach, and, that the cup was empty except for the smell of beer.

Petition at 12-13 (emphasis added). In *Ingram v. Wright*, Justice White explained in a dissenting opinion regarding corporal punishment in the public schools that "the due process clause requires not an 'elaborate hearing' before a neutral party, but simply an 'informal give-and-take between student and disciplinarian' which gives the student 'an opportunity to explain his version of the facts.' " 430 U.S. 651, 693, 97 S.Ct. 1401, 1423, 51 L.Ed.2d 711 (1977), *quoting, Goss v. Lopez*, 419 U.S. at 580, 582, 584, 95 S.Ct. at 739, 740, 741, 42 L.Ed.2d 725. From the facts as alleged by Petitioners, Amy McCain received at least the minimal due process required by *Goss v. Lopez*.

In addition to this hearing, Petitioners Amy McCain and her father William R. McCain were provided with three further hearings wherein they were again given an explanation of the charges and an opportunity to present their side of the story. In their complaint, Petitioners

admit that on the morning of the alleged incident, Amy McCain's father William R. McCain met with Vice Principal Bart Busker to discuss the allegations. Complaint at 7.

Petitioners admit to receipt of written notice of the suspension and the bases therefor (possession of a cup of beer - lying to an administrator). *Id.* Petitioners also admit being afforded a hearing on May 29, 1987 in which Vice Principal Bart Busker affirmed the suspension of May 27, 1988, and being afforded the opportunity of appealing the decision to Principal Ray Reiner at a hearing held on June 1 and June 4, 1987, wherein the suspension was again affirmed. Complaint at 8-9. Petitioners admit being afforded a further hearing before District Superintendent Kaye Stripling wherein the suspension was affirmed once again. Complaint at 10. A further hearing was held before the Houston Independent School District Board on November 6, 1987, wherein the suspension was again affirmed. In total, Petitioners were afforded at least five separate hearings wherein they were provided with far more than the due process requirements set forth in *Goss v. Lopez.*

The degree of due process is limited by the lack of severity involved. The mandates of *Goss v. Lopez,* impose requirements:

> which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions. . . . We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to

> verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

419 U.S. at 583, 95 S.Ct. at 740, 42 L.Ed.2d 725. It should be noted, however, that *Goss v. Lopez* speaks only to suspensions of less than ten days, such as in the case at hand. As the Court reasoned:

> requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about the cause and effect. . . . In any event, his discretion will be more informed and we think the risk of error very substantially reduced.

419 U.S. at 583-584, 95 S.Ct. at 741, 42 L.Ed.2d 725. These due process requirements were afforded not only once but at at least five separate hearings which all affirmed the suspension of Amy McCain. Therefore, based on Petitioners' pleadings, this Court should affirm the district court's dismissal of the allegations based on denial of due process.

IV.

THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' CLAIM FOR INVASION OF PRIVACY WHERE PETITIONERS FAILED TO RAISE ANY FACTUAL ALLEGATIONS SUPPORTING THEIR CLAIM

Petitioners claim that the court of appeals erred in not distinguishing Petitioners' invasion of privacy claim from their procedural due process claim. The district court dismissed the invasion of privacy claim, along with numerous other claims, on the grounds that "[Petitioners have] made no factual allegations that would support any of these causes of action." *McCain v. Houston Independent School District*, No. H-88-1796, slip op. at 2. In fact, Petitioners wholly failed to allege what action by any of the Respondents constituted an invasion of privacy. In addition to the due process and equal protection causes of action based on § 1983, § 1985(2) and (3) and § 1986, Petitioners made only conclusory allegations of violations of their right to privacy, illegal search and seizure, equal protection and right to petition. Complaint at 4.

Petitioners have failed to plead any material factual allegations which would support a claim upon which relief could be granted under these theories of recovery. These pleaded violations are conclusions, deductions and opinions, without any factual basis to support a cause of action, and therefore should be dismissed. *See e.g., Briscoe v. LaHue*, 663 F.2d 713 (7th Cir. 1981), *aff'd*, 460 U.S. 325, 103 S.Ct. 1404, 75 L.Ed.2d 96 (1983). Even a *pro se* plaintiff's complaint in a § 1983 cause of action must set forth facts which would support a cause of action; conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss. *Id.*

The only mention of any constitutional violations appears in paragraph 11 and paragraph 36 of the Complaint. In paragraph 11, Petitioners claim that:

> defendants conspired to and did under color of law, willfully and wantonly engage in invidiously discriminatory acts which were intended to and did, in fact, deprive students, their parents or representatives or others similarly situated of their constitutional rights of privacy, due process, illegal search and seizure, equal protection and right to petition for grievances.

Complaint at 4. Additionally, in paragraph 36, Petitioners contend that certain policies and procedures of Respondents deprived students and parents of their constitutional protection, including (a) right to petition, (b) right to privacy, (c) right to be secure from illegal searches and seizures, (d) right to due process, (e) right to equal protection. Complaint at 13. No facts are alleged to support these allegations.

Respondents are well aware that allegations of a complaint, particularly those of a *pro se* plaintiff are to be liberally construed. Conclusory allegations without supporting material facts are not deemed as admitted or true, however, and cannot support a cause of action challenged by a motion to dismiss. *See, Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck*, 463 F.2d 620 (2nd Cir. 1972), *cert. denied*, 410 U.S. 944, 93 S.Ct. 1393, 35 L.Ed.2d 611 (1973) (conclusory allegations could not be presumed as true without supporting material facts). The district court properly dismissed Petitioners' assertions of violations of right to petition, illegal search and seizure,

equal protection violations and violations of right to privacy absent any factual allegations to support these claims.

The court of appeals correctly noted that dismissal on these grounds was entirely proper. *McCain v. Houston Independent School District*, No. 88-2992, slip op. at 5; *citing, Brinkmann v. Johnston*, 793 F.2d 111 (5th Cir. 1986); *Briscoe v. LaHue*, 663 F.2d 713 (7th Cir. 1981). The court of appeals further noted that these claims were appropriate for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *McCain v. Houston Independent School District*, No. 88-2992, slip op. at 6, *citing, Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

V.

THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' CLAIMS UNDER 42 U.S.C. § 1983

Petitioners claim that Respondents have admitted violating Petitioners' right to petition the school board for relief. Petitior at 34. No factual statement accompanied this allegation in Petitioners' Complaint. Petitioners cite a portion of the Texas Education Code, which provides in part:

> (f) A student's parent or guardian is entitled to notice as soon as reasonably possible of a suspension or removal of a student to an alternative education program and an opportunity to participate in a proceeding under this section.

Tex. Educ. Code § 21.301(f) (Vernon's 1987). This Section of the Texas Education Code relates to suspensions of six days or more. *Id.* The suspension at issue in this case was for only two days, thus this Section does not apply.

In any event, Petitioners state that Amy McCain's father William R. McCain met with Vice-Principal Busker "[l]ater that morning. . . . " Petition at 14. Nowhere in the Complaint or the Petition do Petitioners allege that they were not allowed to participate in any subsequent proceeding on this matter. Absent any factual allegations to support these allegations, the district court properly dismissed this claim.

VI.

MINOR AMERICAN STUDENTS ARE NOT A PROTECTED CLASS UNDER 42 U.S.C. § 1985(2) AND (3)

Petitioners claim that minor American students constitute a protected class under 42 U.S.C. § 1985 (2) and (3) as a result of past discrimination against children in the United States. Petition at 34. Protected class status is an essential element to a cause of action under 42 U.S.C. § 1985. *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983). The proposed class of all minor American students does not satisfy the requirements of a class for purposes of 42 U.S.C. § 1985.

In order to qualify a claim under 42 U.S.C. § 1985, a plaintiff must show that the defendant intended to discriminate against the plaintiff based on the plaintiff's race or class. *Griffin v. Breckenridge*, 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d 338 ("there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." (Citation omitted)). Petitioners make no factual allegations to support

their claim that Respondents conspired to discriminate against minor students. The basis of Petitioners' claim is only the action against Petitioner Amy McCain. Petitioners make no allegation nor state any fact to support a claim that Respondents discriminated against other students. A single incident against one member of the proposed class does not reach the level of class based discrimination.

In support of their claim that 42 U.S.C. 1985 (2) and (3) apply, Petitioners cite *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). *Gault* was not brought under 42 U.S.C. § 1985, but as a claim under the Fourteenth Amendment to the United States Constitution, claiming a denial of due process. Neither is *Gault* reflective of the degree of due process warranted in the instant case. The *Gault* court held that a 15 year old boy and his parents were entitled to more due process than they had received where the 15 year old defendant had been sentenced to six years in a juvenile home for making a lewd telephone call. The holding of the *Gault* court has no bearing upon and does not support Petitioners' claim that minor American students are a protected class.

VII.

RESPONDENTS ACTED PROPERLY AND WITHIN ALL APPROPRIATE RULES IN SUSPENDING PETITIONER

For the first time on appeal, Petitioners allege that Respondents failed to follow the proper procedure relating to a long term suspension or an expulsion. Petitioners failed to assert facts in their Complaint to support this

allegation. Thus the district court acted properly in dismissing this claim.

CONCLUSION

Petitioners essentially contend that they are not satisfied with the hearings held on the issue of Amy McCain's two day suspension, primarily the failure of others to believe her version of the incident. Petitioners do not deny that numerous hearings were held, that Petitioners were informed of the charges against Amy McCain or that Petitioners were allowed to relate their version of the facts. Based only upon the Petitioners' Complaint, Petitioners have failed to state a cause of action for which relief could be given.

Similarly, Petitioners' claims of denial of a right to privacy and discrimination are not supported by any facts or authority. Based upon the mere conclusory statements of Petitioners, the district court acted within its direction in dismissing these claims. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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NO. 89-1790

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

AMY McCAIN, A MINOR,
B/N/F WILLIAM R. McCAIN,
WILLIAM R. McCAIN AND
AMY McCAIN,

Petitioners,

vs.

HOUSTON INDEPENDENT SCHOOL DISTRICT,ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Amy McCain and William R. McCain file this their Reply Brief.

ARGUMENT

I. RESPONDENTS PROCEDURAL DUE PROCESS ARGUMENT IS INAPPROPRIATE SINCE DENIAL OF PROCEDURE WAS NOT THE CAUSE OF THE SUBSTANTIVE CONSTITUTIONAL DEPRIVATIONS

The Houston Independent School District et al (HISD) violated the procedural rights of Petitioners at every stage of the proceedings before them. Procedure, however, had nothing to do with the Substantive Due Process deprivations at the school level, with the possible exception of the denial of the Right To Petition. This is so because Due Procedure was not the producing, efficient, or proximate cause of the violations.

HISD suspended Amy McCain for alleged

acts of misconduct which the hearing officer, vice-principal Busker, admitted he knew she did not commit. Further, he said he suspended her, not because of misconduct, but because he needed more information. (Par. 21, Apx. A46, Apx. 3, A81) Thus, he presumed the power to act as prosecutor, judge and legislator. In Goss v. Lopez, 419 U.S.565, 574, 42 L.Ed.2d 725, 734, 95 S.Ct. 729 (1975) The Supreme Court pointed out that the purpose of:

> ". .fundamentally fair procedure (was) to determine whether the misconduct has occurred."

Since Mr. Busker had decided to act arbitrarily, in defiance of the known facts, denial of Procedural Process was not the cause of the Substantive Due Process violation. Amy was not suspended until the following morning, May 27, when Amy's adult sister questioned Mr. Busker regard- the school authorizing the beer to be brought on campus for a class demonstration.

BEST AVAILABLE COPY

II. THIS CASE IS BEFORE THE COURT ON A DECISION REGARDING A MOTION FOR SUMMARY JUDGMENT FOR RESPONDENTS, HISD

> "Both courts have invaded the province of the jury by weighing the evidence alleged in Petitioners' complaint by arbitrarily deciding what part of the Petitioners' complaint and supporting evidence they would choose to believe. (Pet. p. 31)

Respondents refuse to address petitioners' argument on Invasion Of Privacy and, instead, attempt to convince The Supreme Court to treat the Privacy and other substantive issues as a Motion To Dismiss.

Respondents' assertion that "Petitioners' claims of denial of a right to privacy (are) . .not supported by any facts or authority." is absurd. (Res. Br. p. 14)

Equally absurd is their attempt to convince the Supreme Court to adopt the standard of review used in a Motion To Dismiss, when reviewing a Motion For Summary Judgment, then refusing to invade the record on the Substantive Due Process issues. After disposing of the record, HISD says:

"Conculsionary allegations without supporting material facts are not deemed as admitted or true. .and cannot support a cause of action challenged by a Motion To Dismiss." (our emphasis) (Res. Br. p. 11)

HISD points out that they convinced the appellate court to adopt this bizarre scheme:

"The court of appeals further noted that these claims were appropriate for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure." (Res. Br. p. 11)(our emphasis)

The appellate court said:

"The district court also correctly concluded that, even based upon a liberal interpretation of the McCains' pro se complaint they have failed to assert facts supportive of a violation of the right to petition, the right to be free from illegal search and siezure, the right of equal protection or the right to privacy" (Apx. A9, 10)(our emphasis)

The appellate court's justification of the dual treatment of the motions denies Petitioners their right to amend the complaint since res judicata attaches in a Motion For Summary Judgment. (See Apx. A10)

Either this case is here on a Motion for

Summary Judgment or it is not. In their introductory and conclusionary paragraphs, Respondents have tried to convince this Court that this case is here as an administrative appeal; that Amy McCain's complaint was ". .founded on the failure of Respondents to accept Petitioners' version of the facts."

This case is not here on an administrative appeal. It is here on appeal of a Summary Judgment under 42U.S.C. 1983 (1985,86, 88) because of HISD's:

> ". .deprivation of rights, privileges or immunities secured by the Constitution and the laws. .under color of the statutes, ordinances, regulations, custom or usage of the State of Texas and the HISD." (Apx. A38)

A Motion For Summary Judgment places on the "mover" the burden of showing that:

> ". .if this case goes to trial there will be no competent evidence to support a finding for his opponent." Barron & Holzoff, Sum Jdg., Ch. 11, p. 146)

III. THE DISTRICT COURT'S CONVERSION OF THE MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT HAS NEVER BEEN AN ISSUE IN THIS CASE (Respondents' Issue II)

The Respondents' brief is a series of sham issues in which they attempt to divert the attention of this Court from the real issues. The actual issue was:

> "The Court converted the Motion To Dismiss into a Motion For Summary Judgment on its own Motion without setting a submission date. .as a result the 17 year old minor in this case was required to compose an affidavit and transcribe the rough draft of the memorandum filed on August 8, 1988, in the emergency absence of her father and next friend."

(App. Br. below p. 14,Pet. Br. p. 9)

After the original submission date the Court allowed HISD to amend their motion yet refused Petitioners motion to set a new date, though they knew Mr. McCain was to be out of the country. As a result of the confusion injected by the Petitioners, the 5th Circuitbelieved (see Apx. A9):

> "The McCains also contend that they were not given adequate time to respond. ."

The net result was reversible error:

> ". .a court's failure to comply with the notice provision CONSTITUTES REVERSIBLE ERROR." (our emphasis, 38 Fed. Proc. L. Ed. Sec. 62.577, p. 65. See also Sec. 62:576 p. 64)

V. INVASION OF PRIVACY

Respondents assert at p. 14 that:

"Petitioners' claims of a right to privacy (are). .not supported by facts or authority." (our emphasis)

In support of our argument on Invasion Of Privacy we have cited the landmark case, Pavesich v. New England Life Ins. Co., 50 So. 68 (1905) We have alleged that HISD violated 42 U.S.C 1983 Pet. Br. p. 4, Apx. A38 and that they acted:

". .under color of the statutes, ordinances, regulations, custom or usage of the State of Texas and theHISD. ." (Cpt. Apx. A38)

We quoted the Texas Administrative Code (TAC 19 Sec. 177.1 Sec. (e)(3), (4) in our complaint:

"(3) The educator shall not intentionally expose the student to disparagement.

(4) The educator shall not reveal confidential information concerning a student unless disclosure serves professional purposes or is required by law. (Cpt. Apx. A59)

We quoted HISD Board Policy & Procedure

Sec. 756.000 (e):

"Sec. (e) This section provides for hearings that '. .will be closed to the public' " (Apx. A32, our emphasis)

We alleged that Amy was wrongfully accused of crimes and that:

"Said accusations along with threats of arrest, suspension or expulsion were made in the presence and hearing of students and other people who were neither party to nor essential to the proceedings. With the door to the principals office left wide open, Mr. Brew and Mr. Busker accused Amy McCain and other students'. .of drinking beer. They never asked them if they were; they wouldn't even let the(m) tell their story.' " (Affidavit Apx. A45)

"Defendants' conduct. .was intentional or reckless and so extreme in degree as to go beyond all reasonable bounds of decency and caused the plaintiff severe emotional distress by reason of the acts of intimidation, humiliation and public scorn and ridicule before fellow students, teachers, and other persons. . The defendants. .knew that they were engaging in destructive acts which would cause and in fact did damage Amy McCain's opportunities for higher education along with damage to her employability. .As a resuit of the public accusations some now believe that Amy McCain was arrested and thrown in jail for dope." (Complaint Par. 41, Apx. A62, Apx. 3, A76)

HISD has never denied these charges.

We have added part of the record in Apx.

"3", p.A76 which both the School Board and the federal judiciary refused to consider which states:

> "Now my daughter is expected to return to school and attempt to compete in your accelerated program with a home-room teacher who set in motion the conditions which resulted in the beer keg and beer tapper being brought onto the campus to start with. In addition she is to be under the administration of the Mr. Busker who falsely accused her, slandered her, threatened retaliation, denied her civil rights and threatened her father."

HISD knew the facts on which our Invasion of Privacy theory was based as early as June 24, 1987 when 34 of the 54 pages of record were filed, a record which on July 8, 1987 they claimed they never received. The district record at R. 29 et. seq. says:

> "The principals have violated Article Seven, Student procedures, HISD Administrative procedure, Sec. 756.000, at the sub-sections indicated, in the following respect: . .(Apx. 3, A80,810)
>
> 10. Mr. Busker violated Amy McCain's Constitutional right to privacy by failing to make her initial 'hearing' of 5-26-87 '. .closed to the public.' (e., TAC 19 Se. 177.1(e)(3)(4) Code of Ethics)

11. Mr. Busker made statements on May 26, 1987 about Amy Elizabeth McCain that were slanderous per se and were not privileged because said statements were made before students who were neither party to, privy to, nor essential to the proceedings taking place. (TAC 19 Sec. 177.1)

12. Mr. Busker made accusations against Amy Elizabeth McCain which he believed to be untrue. (TAC 19 Sec. 177.1 Code Of Ethics)

There is simply no question that Petitioners complaint was well-conceived and well-crafted. We are in an age when governmental privateering is on the increase. When the motivation for this privateering turns from greed to the abuse of Classes of American Citizens then liberty itself comes under attack.

In this case the Invasion of Amy McCain's Privacy was immediate, direct and irretrievable at the time it was committed. Procedure was neither the producing, efficient or proximate cause of the constitutional deprivation, nor could it redeem the irreparable damage inflicted on the

reputation of Amy McCain. Regarding denial of Substantive Due Process rights under the Fourteenth Amendment the Supreme Court has said:

> "There could be no clearer violation of the Amendment or the statute. No act could be more final or complete, to denude the victim of rights incurred by the amendment's very terms. Those rights so destroyed cannot be restored. Nor could it restore what the federal power shielded. Neither acquittal nor conviction, though affirmed by the state's highest court, could resurrect what the wrongful use of state power has annihilated. There was in this case abuse of state power, which for the Amendment's great purposes was state action, final in the last degree, depriving the victim of his liberty and his life without due process of law." Screws v. United States, 325 U.S. 115, 117, 18 L.Ed. 1510, 1511 (1944)

The landmark case of Invasion of Privacy Pavesich v. New England Life Ins. Co. (supra) said:

> "When the law guarantees to one the right to enjoyment of his life, it gives to him something more than the mere right to breath and exist. While of course, the most flagrant violation would be deprivation of life, yet life itself may be spared, and the enjoyment of life entirely destroyed." (p. 70)

IV. BOTH HISD AND THE FEDERAL JUDICIARY HAVE DENIED PETITIONERS' RIGHT TO PETITION.

The fragile nature of Respondents' case is emphasized by their efforts to confine consideration on this Motion For Summary Judgment to the ". .allegation(s) in Petitioners Complaint:. (Resp. Issue V, p.11) They attempt to show that Amy McCain had no Right To Petition the school board by misquoting the Texas Education Code. At page 11 they quote Sec. (f) 21:3011:

> "(f) A student's parent or guardian is entitled to notice as soon as reasonably possible of a suspension or removal of a student to an alternative education program and an opportunity to participate in a proceeding (before the board) under this section."

They conveniently omit the parenthetical section above. They then state that this section applies to ". .suspensions of six days or more." By definition "Suspension for a total of more than six school days.. is considered an expulsion.." Had the Texas ligislature meant "expulsion" they

would have said "expulsion". (Pet. Br. p.5)

Procedural Due Process in this case was not a search for truth, rather, it was used in the appellate procedure to:

> ". .isolate students in the school invironment from the protection of their parents and natural guardians, and from the protection provided by the laws of Texas and from the state and United States Constitutions." (Cpt. par.12 Apx.41)

> ". .the..policies and procedures were designed to and did. .in fact eliminate appeals before the School Board in student disciplinary cases." (Cpt. par. 33 Apx. A55 et. seq.)

We alleged at paragraph 33(d):

> "The defendants failed and refused to protect the actual record or otherwise failed to preserve or consider the actual evidence, or accurately document evidentiary submissions, transcripts, petitions, briefs or other parts of the record, by failing to keep a record of said events or to lie about the filing or existence thereof."

Defendant Les Sumrall, head of Board Services lied about not receiving the Petition and the 34 pages of record. (Apx.3,p. A67,68) His secretary signed the receipt stating:

"Appeal, assignment of errors, Facts

and arg ument--a total of 17 pages and transcript with 20 pages." (Apx.3,A66-69)

VI. "THE DUE PROCESS CLAUSE. .FORBIDS ARBITRARY DEPRIVATIONS OF LIBERTY, !WHERE A PERSON'S GOOD NAME, REPUTATION, HONOR OR INTEGRITY IS AT STAKE BECAUSE OF WHAT THE GOVERNMENT IS DOING TO HIM.' " Goss v. Lopez, 419 U.S. 565, 575, 42 L.Ed. 2d 725, 735, 95 U.S. 729

The Respondents claim that the Court Of Appeals- -

". .did not intend to declare the Fourteenth Amendment to be void." (Res.Br.2)

Whatever their intentions, they did precisely just that by both word and deed. The quotation from Wood v. Strickland, 420 U.S. 326 (1975) was used to support the paragraph immediately preceeding it. The clear implications of the misquote and the paragraph it supported were pointed out to the Fifth Circuit in both the Motion For Rehearing and the In Banc Suggestion:

"This Court now tells Amy McCain whether she was 'drinking beer' or '. .Whether she was holding a cup of beer is not a question of material fact concerning the issue of procedural due process or concerning any other potential basis for relief.' (Opin. Apx. A12)

> the '. .other potential relief' just happens to be the entire body of Subtantive Due Process rights of which American Citizens are possessed under the 5th and 14th Amendments to the Constitution."

The 5th Circuit's quote above was no "Typographical Error." It was in direct response to the Appellants' (Petitioners') reply brief which said:

> "The complaint is that HISD THROUGH BART BUSKER DENIED HER LIBERTY INTERESTS IN REPUTATION AND HER PROPERTY INTEREST IN AN EDUCATION FOR AN ALLEGED ACT OF MISCONDUCT WHICH THEY KNEW SHE DID NOT COMMIT.
>
> The procedural niceties which they may or may not have followed are immaterial . .Suspensions under HISD'S unwritten policies were not used primarily as a punishment, innitially, rather they were used as an investigative tool to extort confessions and evidence from students.' " (Res. Br. p. 3 below)

The technique which HISD used to strip students of their constitutional rights is not new. Now, it has been endorsed by the Fifth Circuit Court of Appeals, and this is no typographical error. We alleged in our complaint that:

> '. .The Houston Independent School Dis-

> trict has in effect a wholly illegal policy which was intended to and did, in fact, isolate students in the school environment from the protection of their parents and natural guardians, and from the protection provided by the laws of the State of Texas and from the state and United States Constitutions." (Comp't Apx. A41)

We pointed out that the HIDS Board unlawfully delegated the power to act arbitrarily, by engaging in a policy which:

> ". .placed exclusive control of disciplinary policies or procedures in the hands of local school authorities, including Lamar High School. The purpose of said policy was to circumvent the law and to deny students, their parents and representatives access to and benefit of Federal and State Constitutional protections as well as state law and Texas Education Agency and HISD regulations, policies and procedures." (Comp. Apx. A42)

Lord Acton said, 'Power tends to corrupt and absolute power corrupts absolutely." Accordingly, our founding fathers provided for the separation of power into the three branches of government, and a devision of power between the states and federal governments. Usurpation by, or improper delegation of that power to the judiciary

resulted in the "Star Chamber". Absolute power vested in the legislative branch results in "Attainer." The vesting of total power in the executive or administrative branches is "Tyranny".

In In Re Gault, 387 U.S. 1, 18 L. Ed.2d 565, 95 S. Ct. 729 this Court observed the danger of absolute power in the judiciary, when youths are involved, quoting Dean Pound, who said:

> "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts. ."

In Joint Anti-Fascist Refugee Com. v. McGrath the Supreme Court held that even the United States Attorney General is accountable for abuse of power:

> ". .the Attorney General has attempted to delegate to himself the power to act arbitrarily. We cannot impute such an attempt to the nations highest law enforcement officer any more than we can to its President" 341 U.S.123, 138, 95 L. Ed. 817, 837

On page 144 Mr. Justice Black wisely observed:

"It is true that the classic bill of attainer was a condemnation by the legislature following investigation by that body. .But I cannot believe that the authors of the Constitution, who outlawed the bill of attainer, inadvertantly endowed the executive with power to engage in the same tyranical policies that made the bill of attainer such an odius institution."

There was no claim, evidence or finding that Amy McCain fit the mandatory provisions cited in Par. 22, (Apx. p.A47) of our complaint. Nor do they deny that Amy was not guilty of the misconduct charges which they did make.

The Supreme Court in Wood v. Strickland (supra p. 323) cited Thompson v. City of Lousville which held:

"Just as 'conviction upon a charge not made would be sheer denial of due process' so it is violation of due process to convict and punish a man without evidence of guilt." 362 U.S. 199, 206, 80 S. Ct. 624, 4 L.Ed2d 654 (1960)

The Fifth Circuit held that whether Amy McCain was guilty of the charges made,

". .is not a question of material fact concerning the issue of procedural due process or any other potential basis for

relief." (App. Opin. Apx. p. A12)

To protect the Constitutional Rights of a foot shuffling bar patron who was fined $20 then deny Equal Protection to 40 Million minor Americans would be a:

> ". .plain denial of equal protection of of the laws- -an invidious discrimination." In Re Gault (supra p. 61)

CONCLUSION

This Court has said:

> "An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination'. It is implicit in a government of laws and not of men." Joint Anti-Facist v. McGrath (supra) U.S. p. 136

The defendants suspended Amy McCain for acts of misconduct that they admit she did not commit. Defendants did not even claim that they complied with paragraph 22 (Apx. p. A47) which sets mandatory standards for suspensions. They have never claimed that they addressed Amy McCain's Petition to the HISD Board, the arguments or the record submitted therewith. They simply ignored

the Grievance Petition under Board Policy Sec. 740.100 (Apx. 3, p. A74) The 5th Circuit Court has misquoted the Supreme Court and embraced a system of tyranny which is inconsistent with democratic institutions.

In Tinker v. Des Moines Com. Sch. Dist. (supra) p. 511 the Supreme Court said:

> "In our system, state operated schools may not be enclaves of totalitarianism."

There is no justification of federal or state officials' conduct in this case.

> "He who defies a decision interpreting the Constitution knows precisely what he is doing. If sane, he hardly may be heard to say that he knew not what he did."

> "The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right . . one who acts under 'color' of law may be a federal officer or a state officer. He may be under 'color' of federal law or of state law." Screws v. U.S. (supra) pp. 104, 108

Petitioners respectfully move that their Petition for Writ of Certiorari be granted.

AMY McCAIN, Pro Se
WILLIAM R. McCAIN, Pro Se
P.O. Box 52163
Houston, Tx 77052
713-222-6570

DS

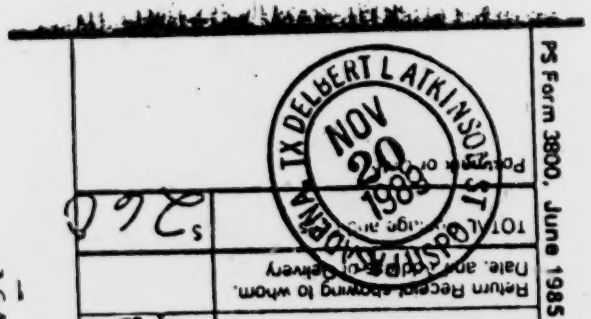
November 19, 1989

Clerk
U. S. COURT OF APPEALS 5th Cir
For the Fifth Circuit
600 Camp Street
New Orleans, LA

IN RE: Amy McCain and William R. McCain v. Houston Independent School district, Case No. 88-2992
Appeal

Dear Sir:

I am enclosing Appellantt' Combined Motion To Amend which I request that you show filed.


TX DELBERT L ATKINSON JR
NOV 20 1989
POSTMASTER
PS Form 3800, June 1985
Return Receipt showing to whom Date, and Address of Delivery

Sincerely yours,

WILLIAM R. MCCAIN

(APPENDIX 3--PART OF THE RECORD)

A64

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

December 1, 1989

Mr. William R. McCain
8001 W. Tidwell, Ste. 920
Houston, TX 77040

No. 88-2992 Amy McCain v. Houston Independent School District, Et Al.

Dear Sir:

In light of this Court's order of November 28, 1989 denying your petition for rehearing, we have been authorized to return herewith, unfiled, your combined motion to amend motion for rehearing and motion to substitute parties nunc pro tunc. (underlining ours)

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

A65

BEST AVAILABLE COPY

IN RE: AMY ELIZABETH McCAIN
b/n/f William R. McCain
parent and natural
guardian

MOTION FOR CONSOLIDATION
AMENDMENT OF
PETITION FOR A PROCEEDING
AND BRIEF

Comes now the petitioner and amends by interlineation her Petition for a proceeding before the Board in the following respects:

1. Petitioner amends her petition at line ten by substituting the citation "Sec.:3011(e)", the citation "Sec. 301.(f)";

2. Petitioner amends her Argument as follows:

(a) In line six the citation "Sec.:3011(c)" should read

A66

the remedies sought.

The petitioner renewsher requests in her petition filed before the Board on June 26,1987 and prays that this matter be set before the Board as soon as possible

AMY ELIZABETH McCAIN, Petitioner,
b/n/f William R. McCain, parent and
natural guardian.

William R. McCain
2411 South Boulevard
Apt 3
Houston, Texas, 77098
713-523-0634

Recd
Dr Gen'l
7/8/87
Document rec'd
Document transmitted

A67

Re: Amy Elizabeth McCa

Received on 6-24-87

appeal, assignment of errors
Facts and argument a total
of 17 pages
and
Transcript with 20 page
this 24 day of June 1987

A68

Transcript with 20 pages
this 24 day of June 1987

Second. No assurance
given that this is appropriate
level at this time.

Terry D. Bryan

A69

(GRIEVANCE AND MEMO, NOT CONSIDERED BY HISD)

BEFORE THE
HOUSTON INDEPENDENT SCHOOL BOARD

IN RE: AMY ELIZABETH McCAIN
b/n/f William R. McCain
Parent and Natural Guardian

APPEAL

Comes now Amy Elizabeth McCain, b/n/f William R. McCain and appeals to the Houston Indepent(sic) School Board the decision of Ray Reiner, Lamar High School Principal, rendered on June 11, 1987, holding that the grievant had no standing to file a grievance.

The petitioner appeals to the Board under Sec. 740.100 HISD Board Policy, Art 7 for failure of the Cluster Manager and General Superintendant to act within the time limits set for in said section.

The petitioner requests that this Board take the following remedial actions:

1. Restrain Mr. Bart Busker, Assistant Principal, from taking any direct or indirect actions against my daughter, Amy Elizabeth McCain;

2. Change the home room teacher of Amy McCain;

3. Instruct the administrative officials to refrain from engaging in any retaliatory actions against Amy McCain;

4. Take whatever action is appropriate against said parties by reason of their threatening attit(u)des and violation of petitioner's constitutional rights;

5. In the event that Dr. Stripling or some other party reverses the suspension decision, that Amy McCain be furnished an exculpatory letter and appology for the outrageous treatment of her;

6. Petitioner further requests that the Lamar administrator(s) refrain from any disciplinary actions against the said Amy McCain unless and until her parent or other legal representative is present with the exception of emergency removal as provided in Texas Administrative Code, Ch. 133, p.9, Sec. (c), (1) and (2).

(sig) William R. McCain
AMY ELIZABETH McCAIN,BNF
William R. McCain, Parent
and Natural Guardian

MEMORANDUM

On or about July 16, 1987 I recieved the enclosed letter which I will refer to as Student's Exhibit "N".

This letter from Edward L. Cline, Assistant Superintendant refers the matter of

Amy Elizabeth McCain to Dr. Kay Stripling Superintendant of District XIV. This letter makes no reference to the status of the grievance against Vice-crincipal Bart Busker and Lamar High School principal Ray Reiner.

There are two proceedings before the Houston Independant School District.

1. The decision of Mr. Bart Busker, Assistant-principal's suspension of Amy Eizabeth McCain and its affirmation by Principal Ray Reiner.

2. The grievance filed against Mr. Busker and Mr. Reiner.

1. The suspension proceeding:

On August 14, 1987, 55 days after the suspension of Amy McCain, an appeal was heard at Dr. Stripling's office. Although I was advised that this was an appeal on the record (not an evidentiary hearing) evidence was permitted over the objection of this petitioner. The hearing was recorded.

Sec. 753.400(f) provides:

"At the hearing on appeal, the next superior officer shall conduct a de novo hearing attended by school officials, the student, and his parent or guardian. The next superior officer will determine whether the student shall be suspended or expelled or be reinstated. . Appeals above this level shall be apprals on the record: no new evidence may be introduced." (our emphasis)

An evidentiary hearing was held before Mr. Busker and appealed de novo to Mr. Reiner in May 1987 and any further appellate procedures should have been made on the established record only. Further Sec. (g) provides for a direct appeal to the Board and not to the cluster administrator or the General Superintendant.

On July 8, 1987 we petitioned that the appeal be set before the Board and the Board failed to take any action.

2. The grievance procedure:

Your grievance procedures provide a 5 day period to set a hearing and another 5 days to make a decision. If no decision is rendered the grievant may automaticly

appeal to the next level. Sec. 740:100 HISD Policy says, "The number of days indicated at each level shall be considered a maximum."

The case has been before the General Superindendant since July 7, 1987 well over the 10 days set as m(a)ximums by your by your own rules.

The above section additionally states:

> "All time limits herein shall consist ot school days except that when a grievance is submitted on or after May, 1, time limits shall consist of calendar days so that the matter may be resolved before the close of the school term or within 30 days thereafter." (our emphasis)

The grievance was filed June 10 and we have yet to find one school administrator making a decision on the merits.

The Board already has a copy of the grivance in its possession and we are incorporation this copy by reference in our ap= peal to you and request that you meet with us.

3. Summary of Grievance:

(a) One of your teachers assigned a student a class project which involved the fabrication of a beer tapper for a keg of beer. That student apparently brought a keg of beer on the Lamar High School Campus in order to demonstrate the tapper;

(b) Amy McCain has been accused of drinking beer and "Possion (sic) of a cup of beer. ." Your Vice-principal, Mr. Bart Busker, told me on 5-27-87 that he was going to accuse her of "Possession of a cup of beer", although he knew that she did not have said cup of beer;

(c) On 5-27-87 your Mr. Busker in an angry and antagonistic manner threatened to retaliate against my daughter because of my objection to his making an accusation against her which he had reason to believe was untrue:

(d) The HISD through its agents and employees has totally failed to provide my daughter the most basic due process of law and thereby violated her civil rights;

(e) Your Mr. Busker did on 5-26-87 falsly and slanderously accuse my daughter of a crime in the presence of witnesses who were neit her privy to nor necessary to the proccedings (sic) at hand;

(f) Your agents, administrators and employees have refused to accept or act on the grivance filed 74 days ago although your Board Policy and Procedures mandate

PETITION TO BOARD (SEE A66 THROUGH A 69)

IN RE: AMY ELIZABETH McCAIN, Petitioner b/n/f/ William R. McCain, Parent and Natural Guardian

Comes now Amy Elizabeth McCain, by next friend, William R. McCain and petitions the Board for a proceeding before the Board, Pursuant to State of Texas, Acts 1986th Leg., 2nd C. S. Ch. 4, Sec. 2, in Sec. 21:3011(e), at the Board's earliest convenience.

Petitioner further petitions, moves and requests that the Board advise the petitioner as to:

(1) The nature of the proceeding described in Sec. 31.301(f);

(2) Whether said proceeding is in the nature of an appeal, trial de novo, or some other entity;

(3) Whether there are any policies, procedures, or other statements or written materials regarding said proceeding.

Petitioner further moves that all tape recordings made between, the petitioner or her representatives and Lamar High School

Principal Ray Reiner, be transcribed and furnished to petitioner.

The Board is advised that an appeal is being filed coincidently with Dr. Kay Stripling in order to avoid an improper election of procedural remedies since such remedies are not apparent to us.

Petitioner prays for a finding in favor of the petitioner and that all references to this proceeding and all records of the student at the local school be expunged and for all other proper relief in the premises.

AMY ELIZABETH McCAIN, b.n.f
William R. McCain, Parent
and Natural Guardian
(sig. William R. McCain)
William R. McCain, Pro Se
2411 South Boulevard
Houston, Texas77098
713-523-0634

ASSIGNMENT OF ERRORS

The HISD through its agents, employees, designees and principals have violated the 1st, 5th, 4th, and14th Amendments to the

a decision within 30 days, thereby violating my daughter's constitutional right to petition;

(g) Both your Mr. Busker and Principal Reiner have threatened me with law suits if I proceed to represent my daughter's legitimate interests;

(h) On 8-14-87 while attempting to present my argument to Dr. Stripling, the hearing officer regarding the suspension appeal, I was interupted by Mr. Busker. I advised him that I was not talking to him. He answered in a confrontational manner "Are you afraid to talk to me, Mr. McCain." Taking in consideration his menacing look and manner I interpreted this statement to represent a threat of bodily harm to me;

(i) Because of your Mr. Busker's slanderous accusations, information has come back to my daughter that other students believe my daughter was expelled from school for a semester for using illegal drugs and arrested and taken to jail;

Now my daughter is expected to return to school and attempt to compete in your accelerated program with a home room teacher who set in motion the conditions which resulted in the beer keg and tapper being brought onto the campus, to start with. In addition she is to be under the administration of the Mr. Busker who falsly ac-

cused her, slandered her, threatened retaliation, denied her civil rights and threatened her father.

(The remainder of this Memorandum has to do with our prayer for relief)

Constitution of the United States and their Texas equivalents.

The principals have violated Article Seven, Student procedures, HISD Administrative Procedure, Sec. 756.000, at the subsections indicated, in the following respects:

1. They have failed to provide an impartial hearer of the facts. (Exhib.A, (b)

2. They have failed to record the hearing before Bart Busker after a formal request to do so. (d, Exhib.A)

3. The hearing officers did not present competent evidence in support of their allegations, nor did they present the accusing witnesses for testimony or cross examination. (i.(3), j, g,)

4. The hearing officers failed to advise the petitioner of the nature of the hearing, the issues to be decided or to provide written findings on decisions. (a. k.)

5. The Principals failed to furnish, in advance, the names of the administration's witnesses together with a general description of their testimony. (i.(3))

6. The principals failed to present a case against Amy McCain. There was

neither substantial nor competent evidence presented in support of their case against Amy McCain. (i.(3), j.)

7. The hearing members took into consideration incompetent evidence or information, accumulated in secret, which was not presented at any hearing. (j.)

8. The principals failed to make a decision specific enough so that a reasonable person could be advised of the finding and know what to appeal at the next level.(k.)

9. The principals failed to advise the petitioner as to how to appeal their alleged decision or of the existence of a grievance system or form. (k. Sec 740.10, et seq, and 740.20, et seq)

10. Mr. Busker violated Amy McCain's Constitutional right to privacy by failing to make her initial 'hearing' of 5-26-87 '...closed to the public. (e., TAC 19 Se. 177.1(e)(3)(4) Code of Ethics)

11. Mr. Busker made statements on May 26, 1987 about Amy Elizabeth McCain that were slanderous per se and were not privileged because said statements were made before students who were neither party to, privy to, nor essential to the proceedings taking place. (TAC 19 Sec. 177.1 (e)(3)(4)

12. Mr. Busker made accusations against Amy Elizabeth McCain which he believed to be untrue. (TAC 19 Sec. 177.1 Code of Ethics(e)(6))

13. Mr. Busker proceeded under'Attachment 5, November 12, 1986, SUSPENSION OF STUDENTS", an unconstitutional policy, which he knew was obsolete. (TAC 19 Sec. 177.1 Code of Ethics, "ethical conduct toward students" (e)(2))

14. Mr. Reiner on 6-11-87 says, "You do not have a standing to file a grievance against the principal"(Student's Exhibit J-1) [w]hich statement is not true.(Art. 7 , HISD Board Policy 251.00)

15. Mr. Busker and Mr. Reiner failed to adhere to HISD Board Policy 252:00 which provides:

> "The Board or its designee may not suspend...the student except as provided in board Policy section(s)...756.00."

16. Mr. Busker and Mr. Reiner failed to adhere to HISD Board Policy Sec. 251 which provides:

> "Discipline shall be administered in accordance with guidelines published in the Board-approved 'Code of Student Conduct': Your Rights and Responsibilities."

17. Mr. Busker and Mr. Reiner violated the Texas Education Code, Sec. 21:301 (b)(1) and (2) by suspending Amy McCain without the mandatory determination (and student-parent notification) that:

> "(1)the student's presence in the regular classroom program or at the home campus presents a danger of physical harm to the

student or to other individuals; or

"(2) that the student has engaged in serious or persistant misbehavior that violates the districts perviously [sic] communicated standards of student conduct."

18. Mr. Busker and Mr. Reiner failed to adhere to HISD Board Policy (Art7, 752.000; as reflected in the third paragraph on page 13, Code of Student Conduct, which said policy was mandated by Texas Education Code Sec. 21:301 (b)(1)(2)

(sig. William R. McCain)